

AUG 28 1985

JOSEPH F. SPANIOL, JR.

IN THE
Supreme Court of the United States

October Term 1984

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals For the Second Circuit

JOINT APPENDIX

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Petition for Certiorari Filed March 18, 1985
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Chronological List of Relevant Docket Entries

No. 84-1479

Henderson v. Wilson

<i>Date</i>	<i>Docket Entry</i>
August 27, 1970	Bronx County indictment number 2839/70 is filed, charging Joseph Allan Wilson with murder and possession of a weapon as a felony.
April 12-13, 1972	Pursuant to Wilson's motion to suppress statements he made to Detective Walter Cullen and to Benny Lee, a pre-trial <i>Huntley</i> hearing is conducted in Supreme Court of the State of New York, Bronx County before Hon. Edward T. McCaffrey. At the conclusion of the hearing, the Court denies Wilson's motion.
April 17-20, 1972	A jury trial is conducted in Supreme Court of the State of New York, Bronx County. At the conclusion of the trial, Wilson is found guilty of all charges contained in the indictment.
May 18, 1972	Wilson is sentenced to an indeterminate term of twenty years to life imprisonment pursuant to his murder conviction and to a concurrent, indeterminate term of not more than seven years pursuant to his conviction of possession of a weapon as a felony.

Chronological List of Relevant Docket Entries

<i>Date</i>	<i>Docket Entry</i>
April 23, 1973	The Supreme Court of the State of New York, Appellate Division, First Department, affirms Wilson's judgment of conviction.
October, 1973	Leave to appeal to the Court of Appeals of the State of New York is denied.
December 7, 1973	Wilson, <i>pro se</i> , files a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York [83 Civ. 5186 (RCL)]. He claims, <i>inter alia</i> , that his statements to Benny Lee were obtained in violation of the Sixth Amendment.
January 18, 1974	The State of New York, represented by the New York State Attorney General, files its response.
February 13, 1974 March 25, 1974	Wilson files his reply.
January 7, 1977	United States District Judge Robert L. Carter issues an order, with an accompanying opinion, denying Wilson's petition for a writ of habeas corpus.
April 12, 1977	Wilson files a notice of appeal from the District Court's order.
May 23, 1978	Wilson's appeal is argued before the United States Court of Appeals for the Second Circuit (78-2015). Wilson is represented by assigned counsel, Jeffrey Ira Zuckerman.

Chronological List of Relevant Docket Entries

<i>Date</i>	<i>Docket Entry</i>
September 20, 1978	The Court of Appeals for the Second Circuit affirms the District Court's order denying Wilson's petition. Circuit Judge James L. Oakes files a dissenting opinion.
October 10, 1978	Wilson submits a petition for rehearing containing a suggestion for rehearing en banc.
January 23, 1979	The Court of Appeals for the Second Circuit denies Wilson's petition for rehearing.
April 27, 1979	Wilson files a petition for a writ of certiorari in this Court.
June 18, 1979	This Court denies Wilson's petition for a writ of certiorari.
September 11, 1981	Wilson files a motion in the Supreme Court of the State of New York, Bronx County, seeking to vacate the judgment of conviction on the ground that the state's use of his statements to Benny Lee violated his constitutional right to counsel.
November 20, 1981	The Supreme Court of the State of New York, Bronx County, per Justice Joseph Cohen, denies Wilson's motion.
January 19, 1982	The Supreme Court of the State of New York, Appellate Division, First Department, denies Wilson's application for leave to appeal.

Chronological List of Relevant Docket Entries

<i>Date</i>	<i>Docket Entry</i>
July 2, 1982	Wilson, represented <i>pro bono</i> by Ida C. Wurczinger and Philip S. Weber, files a second petition for a federal writ of habeas corpus based on his claim that his statements to Benny Lee were obtained in violation of the Sixth Amendment and a motion for an order pursuant to Fed. R. Civ. P. 60(b)(6) vacating the prior order which denied the original petition for a writ of habeas corpus [82 Civ. 4397 (LPG)].
August 19, 1982	The State of New York, represented by the Bronx County District Attorney, files a response to the petition and motion.
August 30, 1982	Wilson files a reply memorandum.
October 27, 1982	United States District Judge Lee P. Gagliardi hears oral argument by counsel for Wilson and counsel for the state.
March 30, 1983	District Judge Gagliardi issues a memorandum decision dismissing the petition for a writ of habeas corpus and denying the Rule 60(b)(6) motion.
April 18, 1983	Wilson files a notice of appeal from the District Court's order.
December 14, 1983	Three justices of the Court of Appeals for the Second Circuit grant a certificate of probable cause to pursue an appeal of the denial of a writ of habeas corpus.

Chronological List of Relevant Docket Entries

<i>Date</i>	<i>Docket Entry</i>
April 5, 1984	The United States Court of Appeals for the Second Circuit hears oral argument on the appeal from the dismissal of Wilson's petition for a writ of habeas corpus.
August 27, 1984	The Court of Appeals for the Second Circuit reverses the judgment of the District Court, which denied Wilson's application for habeas corpus relief, and remands with instructions to grant Wilson's application and to direct his release unless the State elects to retry him. Circuit Judge Ellsworth A. Van Graafeiland files a dissenting opinion.
September 10, 1984	The Bronx County District Attorney, on behalf of the State of New York, files a petition for rehearing containing a suggestion for rehearing en banc.
December 17, 1984	The Court of Appeals denies the petition for rehearing.

**Documents Included in Appendix to Petition
For a Writ of Certiorari**

The following documents have been omitted in the printing of this Appendix because they are included in the appendix to the petition for a writ of certiorari filed in this Court on March 18, 1985:

1. Opinion of the United States Court of Appeals for the Second Circuit, August 27, 1984 (the decision in question on this appeal) (Appendix A).
2. Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing, December 17, 1984 (Appendix B).
3. Memorandum Decision of United States District Judge Lee P. Gagliardi, March 30, 1983 (Appendix C).
4. Opinion of United States District Judge Robert L. Carter, January 7, 1977 (Appendix D).
5. Opinion of the United States Court of Appeals for the Second Circuit, September 20, 1978 (Appendix E).
6. Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing, January 23, 1979 (Appendix F).

Transcript of Proceedings

SUPREME COURT: STATE OF NEW YORK

PART 20: BRONX COUNTY

Indictment # 2839/70

Charge: Murder and Possession of Weapon

PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH ALLEN WILSON,

Defendant.

HEARINGS & TRIAL

Commencing April 12, 1972

**Bronx County Courthouse
851 Grand Concourse
Bronx, N.Y. 10451**

Before:

**HON. EDWARD T. McCaffrey,
Justice.**

Appearances:

FOR THE PEOPLE:

**BURTON B. ROBERTS, Esq.,
District Attorney
County of Bronx
By: ROBERT CANTOR, Esq.,
Ass't District Attorney.**

FOR DEFENDANT:

**ALFRED H. ADLER, Esq.,
445 Park Avenue
New York, N.Y.
(Pursuant to Assignment)**

COURT CLERK:

H. KURTZ

HERBERT H. LANDMAN

Official Court Reporter, C.P., C.M.

Selected Hearing Testimony of Detective Walter Cullen

[10] DETECTIVE WALTER J. CULLEN, Shield 1778, 9th Detective District Homicide Assault Squad, New York City Police Department, having been called as a witness by and on behalf of the People, testified as follows:

Direct examination by Mr. Cantor:

Mr. Cantor: If your Honor please, I have an application and that is that all witnesses be excused from the courtroom.

The Court: Does the defense have any witnesses in the courtroom at this time?

Mr. Adler: No, sir.

Mr. Cantor: There are two witnesses, your Honor, namely the mother of the defendant and the brother of the defendant who very well may be called by the People at the trial of this action. I ask they be excused from this courtroom.

[11] Mr. Adler: You're discussing the trial of the action.

Mr. Cantor: Yes. Well, there's information to be disclosed here, Your Honor, that bears critically on the trial.

The Court: All right. Exclude all witnesses and potential and otherwise.

Court Officer: Step outside, officer, please.

The Court: Outside, please.

(Potential witnesses leave courtroom.)

Mr. Adler: The defendant informs me that there will be—these parties will not be witnesses, Judge.

The Court: For him, but Mr. Cantor has indicated they may be called by the People.

Mr. Adler: All right.

Selected Hearing Testimony of Detective Walter Cullen

Q. Det. Cullen, in July of 1970, were you a member of the New York City Police Department?

A. Yes.

Q. And for how many years have you been as of this date a member of the New York City Police Department?

A. Of the 1st of February, seventeen years.

[12] Q. Det. Cullen, in July, more specifically, July 4, 1970, what was your assignment within the Police Department?

A. I was assigned to the Bronx Homicide Squad.

Q. Det. Cullen, do you know who the arresting officer in this case is?

A. Yes.

Q. Who is that?

A. Det. Dunn, D-u-n-n.

Q. And did you assist on the investigation of this case?

A. Yes, I did.

Q. Det. Cullen, let me refer you to July 8, 1970. On that particular date, how many days had passed since the commission of the homicide in question?

A. Four.

Q. And on that particular date, sir, in the morning did you find yourself in a particular police station house?

A. The morning of the 8th?

Q. Yes.

A. Yes, in the 44 Squad.

Q. Is that in the 44th Detective Squad, sir?

A. Yes.

[13] Q. Now, at approximately 10:45 or 11 o'clock on that date, Det. Cullen, did you receive a telephone call?

A. I did.

Q. And tell his Honor from where that telephone call emanated, sir?

A. From the 42nd Precinct—42nd Squad, I'm sorry.

Selected Hearing Testimony of Detective Walter Cullen

Q. And the subject matter of the conversation of that telephone call, Det. Cullen, to what did that pertain?

Mr. Adler: I object to that, Your Honor.

The Court: Sustained.

Q. Det. Cullen, did there come a time that that telephone call came to a close?

A. Yes.

Q. Was over?

A. Yes.

Q. And let me refer you, Det. Cullen, to about 11:10 or 11:20, later on that morning; were you still at the 44th Detective Squad?

A. Yes.

Q. And at that particular time, Det. Cullen, did some civilians come into that Detective Squad?

A. Yes.

[14] Q. How many, sir?

A. Two.

Q. Do you see one of those two civilians here in court today?

A. Yes.

Q. Point him out, please.

A. The defendant, seated at the bench beside counsel.

Mr. Cantor: May the record indicate the witness has pointed to the defendant.

Q. And who accompanied defendant into the Squad, sir?

A. His brother.

Q. Do you know the brother's name?

A. Yes, Michael Wilson.

Q. And do you know the defendant's name?

A. Yes.

Q. And what is his name, sir?

A. Joseph Allen Wilson.

Selected Hearing Testimony of Detective Walter Cullen

Q. At that particular time was there a conversation in the defendant's presence between yourself and Michael Wilson when they first came in?

A. Yes.

Q. What did Michael Wilson say to you?

Mr. Adler: I object [illegible].

[15] Q. In the defendant's presence.

Mr. Adler: I object unless there was some acquiescence on the part of the defendant.

Mr. Cantor: May I briefly say this, Judge, that this is a preliminary hearing, a voluntariness hearing, and by the statutory mandate hearsay evidence is admissible at a pre-trial hearing.

The Court: Objection overruled.

Mr. Adler: Exception, if Your Honor please.

Q. What did Michael Wilson tell you, sir, in the presence of the defendant when he came in with the defendant?

A. Well, we introduced ourselves to one another.

Q. Well, that's a characterization. Tell us what Michael Wilson, to the best of your recollection in substance and effect, said to you.

Mr. Adler: Well, I object to substance and effect. I want to get his best recollection of what he said.

The Court: Give us your best recollection of what was said.

Q. By way of introduction, I mean.

A. He introduced himself as Michael Wilson. He introduced his brother.

[16] Q. And how did he introduce his brother?

A. His brother, Joseph.

Q. And you introduced yourself, sir?

A. Yes, Det. Dunn introduced himself.

Selected Hearing Testimony of Detective Walter Cullen

Q. Was Det. Dunn with you in the 44th Squad at that time?

A. Yes, he was.

Q. All right. And upon Michael Wilson introducing himself and his brother and you introducing yourself and Det. Dunn, what, if anything, did you say to this defendant?

A. I told the defendant he was under arrest.

Q. Did you tell him for what, sir?

A. For the murder of Samuel Reiner.

Q. At that particular time did you say something in this defendant's presence to his brother, Michael Wilson?

A. No.

Mr. Adler: Same objection, if Your Honor please.

The Court: Same ruling.

Mr. Adler: Exception.

Q. Det. Cullen—

The Court: The answer was no.

[17] Mr. Adler: Yes, sir, thank you.

Q. Det. Cullen, what then happened after you placed or informed this defendant that he was under arrest?

A. Well, I had a short conversation with his brother.

Q. Well, that's what I'm asking about. What did you say to his brother and what did his brother say to you?

A. Oh, may I refer to my record, Your Honor, please?

The Court: Yes.

A. His brother introduced himself, giving his address and everything else, and then he said his brother, Joseph Allen Wilson, had called him—

Mr. Adler: I can't hear him, I'm sorry, Detective.

The Court: Keep your voice up.

Selected Hearing Testimony of Detective Walter Cullen

A. Excuse me. He said, "My brother Joseph Allen Wilson, had called him that morning."

Q. Detective Cullen, where was this conversation taking place?

A. This was in the Squad Commander's Room in the 44.

Q. Let's go back, Det. Cullen. We're still in the 44th Squad. You have introduced yourself and Detective Dunn to this defendant and his brother after [18] his brother introduced himself and the defendant to you and Det. Dunn. Now, you're still in the Squad proper. At that particular time, did you make a request of the defendant's brother, Michael Wilson, in this defendant's presence?

A. Yes.

Q. Was that a verbal request?

A. Yes.

Q. What is that you said to the defendant's brother, Michael Wilson?

A. I said—

Mr. Adler: I object to all of this, Your Honor. May I have a continuing objection so that there will be no more interruption.

The Court: Objection overruled.

Mr. Adler: Thank you.

A. I asked him if I could speak to him.

Q. What was his reply?

A. Yes.

Q. Where did you go?

A. We went into the Squad Commander's Office. [Illegible] at the desk. He sat alongside the desk. And [illegible] we had that conversation.

Q. How long a period—This was just you and the [19] defendant's brother, Michael Wilson; is that correct?

A. Yes.

Selected Hearing Testimony of Detective Walter Cullen

Q. How long a period of time were you engaged in conversation in the Squad Commander's Room with the defendant's brother, approximately?

A. A little over five minutes, a little less.

Q. Did there come a time when the conversation was at an end?

A. Yes.

Q. Did Michael Wilson leave that room?

A. Yes, he did.

Q. At that particular time what happened after Michael Wilson left that room?

A. [Illegible] over to his brother—

Mr. Adler: Well, now, when he says did he [illegible] that room, Judge, that is certainly leading, and the point of hearsay. I'd like to know if he left of his own volition or he was directed to, unless you want me to take it on cross.

The Court: Objection overruled.

Q. Describe for the Court how the defendant's brother, Michael Wilson, left that room?

A. Our conversation was over, and he got up. I opened the door. He walked out.

[20] Q. At that particular point, where was the defendant when the defendant's brother walked out?

A. To the best of my recollection, the defendant was seated on a bench with Det. Dunn in the Squad Room.

Q. What happened at that point as the defendant's brother was walking into the Squad Room, what did you discuss?

A. I observed him have a short conversation with his brother, with the defendant.

Q. What happened after that short conversation was over between the defendant and his brother?

A. Then Det. Dunn and the defendant came into the Squad Detective's Office.

Selected Hearing Testimony of Detective Walter Cullen

Q. Now, I want you to describe for the Court, if you would be so kind, the physical layout of the 44th Squad upstairs when you first come in.

A. Well, as you enter, there's a short—or a narrow part, like a—

Q. An anteroom?

A. Not an anteroom. It's just a partitioned off, with a door that's locked. And you can go in and out that way.

Q. Is that a swinging-gate door?

A. It's a swinging gate, yes.

[21] Q. And when you passed by that gate door from the first room that you're in, what room do you then come into?

A. It's a large squad room with desks, file cabinets, telephones.

Q. Now, you mention a squad commander's office?

A. Right.

Q. Where is that in relation to the squad room proper?

A. As you walk through that little swinging door, it's to the left of the squad room.

Q. Now, after the defendant's brother had that brief conversation with the defendant by the bench in the squad room, what, if anything, happened with the defendant and Det. Dunn?

A. Det. Dunn escorted him into the Squad Commander's Office.

Q. And so who was present in the Squad Commander's Office at that time, sir?

A. The defendant, Det. Dunn, and myself.

Q. Did you close the door?

A. Yes.

Q. Describe the physical objects within that squad commander's room to His Honor, please.

[22] A. As you walk into the Squad Commander's Officer, there are two desks, they are back to back, whereas,

Selected Hearing Testimony of Detective Walter Cullen

you sit at one desk, the other party is sitting at that desk. You would face each other. There are a couple of chairs; one was alongside the desk. There were filing cabinets, telephones, bulletin board.

Q. Det. Cullen, what position did you occupy in that room?

A. I sat at the first desk, which is to your right as you walk into the Squad Commander's Office.

Q. And where was the defendant?

A. The defendant sat alongside the desk.

Q. And where was Det. Dunn?

A. He was behind the defendant.

Q. Was he facing you, sir?

A. Yes.

(Continued on next page.)

[23] Q. And as you were seated at the desk and the defendant was seated alongside of you, Detective Cullen, did you have a conversation with this defendant?

A. Yes; I did.

Q. And from the very beginning, to the best of your recollection, tell this Court what you said to that defendant and what he said to you?

Mr. Adler: If your Honor pleases, I'm going to object to anything like this unless the defendant had been advised of his rights, that's prior to that time.

The Court: Suppose you wait until you get an answer. Go ahead, tell us what you said at that time.

A. At that time I advised the defendant of his right.

Q. From the beginning, tell us what you said to the defendant and what he said to you?

A. He had a right to remain silent. I asked him if he understood. He said yes. I told him anything he might say could be used against him in a court of law. I asked if he understood; he replied yes. I told him he could have an at-

Selected Hearing Testimony of Detective Walter Cullen

torney; he had a right to an [24] attorney now, at any time in the future. I asked him if he understood; he said yes. I told him if he could not afford an attorney, one would be provided for him free of charge. I asked him if he understood. He said yes. I then asked him, having understood all of this, do you wish to make a statement? And he replied no.

Q. What did you then say?

A. I then asked him, "Well, would you care to tell me what you did on July 4th?"

Q. What did he say to that?

A. Yes.

Q. Now I want to go to that point, Detective Cullen, where you finished advising the defendant of his rights; and you said you informed the defendant that if he could not afford an attorney, one would be provided for him free of cost; and you asked him if he understood; and he replied yes. At that particular point, what if anything happened, with respect to the door of the Squad Commander's Room?

A. Oh yeah, Detective Dunn was—in around that time, he was called out of the office.

Q. And did Detective Dunn leave that office?

A. Yes, he did.

[25] [line missing]

finished advised this defendant of his rights?

A. Yes.

Q. And when he left the office was the door closed?

A. Yes.

Q. Now, Detective Cullen, you informed his Honor that you asked the defendant if he would be willing to tell you where he was on July 4th, and you indicated the defendant said he would. At that particular point did you ask any questions of this defendant?

A. Yes; I asked him if he was employed; and he told me he had been employed as a stock clerk in the garment center; but at that moment he wasn't working.

Selected Hearing Testimony of Detective Walter Cullen

Q. What then did you ask?

A. May I refer to my record, your Honor?

The Court: Yes.

Mr. Adler: I take it that Detective Cullen is not able to testify to the question—to the question asked—answer to the question unless he refers to his notes. I would like the record to reflect that.

The Court: I think the record will show that the detective requested of the Court that he refresh his recollection.

[26] Mr. Adler: I understand, but I like to know whether he can do it without reading, without referring to his notes.

The Court: He's indicated that he needs to refer to his notes.

Q. Detective Cullen, did you take a rather lengthy statement from this defendant?

A. Yes.

Q. Did it occupy several pages in your memorandum book?

A. Yes.

Q. Have you committed those several pages to [illegible] memory, sir?

A. No.

Q. Detective Cullen, refreshing your recollection to notes, after the defendant informed you [illegible] used to work as a worker in the [illegible] shipping clerk, but was not working [illegible] what question did you then ask of [illegible].

Q. What response did he make?

A. He started to tell me what he did on July 4th.

Q. And tell his Honor what the defendant told you?

A. He said he left his house about 2:30, 3 o'clock that day and stopped at an after hours place and met [27]

Selected Hearing Testimony of Detective Walter Cullen

some people who told him that there was nothing happening upstairs.

I then injected a question, and asked him, "Where is that?" He said, "158th Street, between Westchester Avenue—between 158th Street and Union Avenue."

And then he continued, "I then walked over to the garage to see my brother. When I got to the garage, I met my uncle, Rudolph Jackson. He told me my brother was not there. I talked with him and some other men about when I was pumping gas there on cold days. My uncle left; and I went to the back to get me a soda. When I got there there were two men drinking soda.

I then injected a question and asked him if he would describe the two men. And he proceeded to describe them. The first one he described as "Male Negro 20 to 21 years of age, thin face, jutting ears, five foot eight, 145 pounds, wearing a brown knit cap, beige zipper golf jacket, dark brown turtle-neck shirt, brown pants, low-cut playboy shoes, dark, with a buckle."

The second one he described as "Male Negro, 24 to 25, your Honor. I'm sorry, six foot to [28] six foot one, heavy set, about 175 pounds, medium complexion, moustache and goatee, black wavy hair, no hat, black zipper jacket closed, dungarees or blue pants, white low-cut tennis shoes."

Then he proceeded to say, "The first guy; and with that I injected again. I said, "He'll be number one." He said, "All right, number one had a soda and was opening it. Number two was getting his out of the machine. Then I got mine. I think it was Fresca. I don't know what the other two were drinking. I took my soda in the back to look for my brother's tool box. I didn't find it; and was looking at the picture on the wall, and just looking all around. There was a mechanic working on a cab. I told him I was Mike's brother; and they engaged in conversation."

Selected Hearing Testimony of Detective Walter Cullen

I injected a question there, "What was the conversation?" "Just general talk, mechanical work, and things like that." So, therefore, I wrote down here, "Idle conversation."

Then he continues. "Then I said 'good night' and I went into the Dispatcher's Office to say good night to Sam. As I went through one door, going to the [illegible] door, I heard two shots. Then I went into the Dispatcher's Office and saw number one going through [29] the window; and I froze by the cigarette machine. Then number 2 came from outside where the gas pumps are; and number 1 started handing money to number two who was taking it and placing it in his jacket pockets, pants' pockets, and in his belt. Then number 1 came back out through the window and then picked up money from the inside in his arms. Then they ran; and then I ran.

And at this point I injected a question, and I asked him why did he run? And his reply was, "I was afraid I would get blamed. Then I went to Walton Avenue and started to walk left.

In my notes, your Honor, I indicated north in parenthesis, and half way up the block, and through the park; and came out on the Grand Concourse; [illegible] then went south to about 151st Street; and then west on 151st Street to the Melrose Project; walked through; then made it to 790 East 158th Street, my mother's house. But I didn't go up. I then went to the donut shop on Project Avenue, between 160th Street and Longwood Avenue; and stayed there about 20 minutes.

I just walked up to 163rd Street, over to Sutphin Boulevard. Then I walked around the area by myself. Then I injected a question again here. I asked him, [30] "Did you get wet in the rain? And his reply was, "What rain?" And I replied, "Oh, I thought it rained that night." And he replied, "I don't recall it rained." And then he went on,

Selected Hearing Testimony of Detective Walter Cullen

"At about 10 a.m. I went over to Wayne and Gail's house; and I interjected a question there and asked him, "Where is that?" And he replied, "906 Gerard Avenue, Apartment 1-A. When I arrived, I woke them both up.

I asked, I injected a question here and asked him, "Who answered the door?" He said, "Wayne answered the door; and Gail remained in bed. Wayne let me in; and I sat on the couch; and I said to Wayne, "I think I'm in a little trouble," and said, "I'll discuss it with 'him' later." He and Gail were sleeping in the living room and Wayne went and fixed me a couch in the bedroom. Then I laid down and was half awake and half asleep.

About 12:30 or 1, the defendant started to say "Gail" but corrected himself, and said, "Clair from upstairs came in and woke me up, and said, 'I hear you're in a little trouble.' And I said 'I don't want to discuss it'. Then we had general conversation. I asked him what they talked about at that time, just general conversation about trips they [31] were going to take to Bear Mountain, one thing or another over the whole day, weekend, or—

Mr. Adler: Objection. I object to your talking a little too rapidly and not loud enough. Will you please raise your voice.

The Witness: I'm sorry, counsel.

Mr. Adler: All right.

A. At that time I asked him what the conversation was and he replied, "It was just general conversation; talking about the children she had and they were going to take a little trip over the July 4th weekend to Bear Mountain, something like that,"

So in my notes I wrote, "General conversation." I didn't indicate the whole thing. Then Wayne brought me in some breakfast and I asked him what he had. He had four fried eggs, bacon, biscuits and coffee.

Selected Hearing Testimony of Detective Walter Cullen

Mr. Adler: Mr. Cantor, is this gentleman one of your witnesses?

Mr. Cantor: No. (Referring to a man who just entered the courtroom.)

Mr. Adler: All right.

A. Then Wayne and I left about 2:30 or 3 p.m., and went for a car ride in a car that Wayne's mother had rented for him. Wayne parked the car between 160th Street [32] and 161st Street and Tinton Avenue. Then I went up 160th Street to Union Avenue; made a right, and down to 158th Street. I walked back up Union Avenue and met Raymond; and while I was talking to Raymond, my brother came running up to me and said, 'Man, what's happening?' I replied, 'Nothing is happening.' And he said, "Sam is dead" and that I was the only one identified for being on the premises.

I said, "I was on the premises and I was there when it went on, but I didn't want to discuss it." Then he told me that the cops had broken down my door and had bullet-proof vests and guns and said that I was armed and dangerous and that really shook me up.

Then I told him I'll call you. At this point the defendant said, "And that's all." And then I asked him, "That's all? Did you care to tell me where you were between July 4th and the 8th?" And he said, "No, that's all I have to say."

Q. Now, Detective Cullen, at that particular point, did the defendant remain with you in the Squad Commander's Room after the conversation was concluded or did he—

A. No.

Q. Or did he go someplace else?

[33] A. No; we got up; we opened the door; we escorted him out; and then in all probability he was put into the detention cell in his—I don't recall exactly whether he remained outside the cell for any length of time.

Selected Hearing Testimony of Detective Walter Cullen

Q. But he remained in the vicinity of the Squad Room and the Squad cell?

A. Yes; he was either in the squad room or detention cell in the squad room.

Q. Well, for approximately how long a period of time, Detective Cullen, would you say that your conversation with this defendant in the Squad Commanders Office lasted, approximately?

A. Well maybe 20 minutes to a half an hour.

Q. And to the best of your recollection, have you related to his Honor the entirety of the conversation had between you and the defendant?

A. Yes.

Q. Subsequent to that, Detective Cullen, did you have any other conversation with the defendant?

A. No.

(See next page)

[34] Did anyone else, in your presence, Detective Cullen, subsequent to your conversation, have any conversation with this defendant? Police officer?

A. I can't recall. I mean—

Mr. Adler: I object to anything further. He can't recall.

The Court: Yes.

Q. All right, Det. Cullen, let me refer you to July 7th, 1970. On that particular day, Sir, did you have occasion to go to the Bronx House of Detention?

A. Yes.

Q. Det. Cullen, do you know a man—

Mr. Cantor: I'll withdraw that.

Q. Did you know a man at that time by the name of Benny Lee?

A. Yes.

Selected Hearing Testimony of Detective Walter Cullen

Q. And on July 7th, did you see Mr. Lee?

A. I did.

Q. And where did you see Mr. Lee?

A. At the Bronx House of Detention.

Q. And did you have a conversation with Mr. Lee at the Bronx House of Detention on that day?

A. I did.

Q. By the way, on July 7th, 1970 was Mr. Lee an [35] inmate of that institution?

A. Yes he was.

Q. Tell His Honor what you said to Mr. Lee.

Mr. Adler: I object to any connection with the defendant. No basis for it.

Mr. Cantor: I think I'll develop that basis, Your Honor, through the next witness that testifies at this hearing.

The Court: For the purpose of the hearing, objection overruled.

Mr. Adler: Exception.

Q. Please continue, Officer.

A. I told Mr. Lee that an arrest was imminent, of Joseph Allen Wilson, and I explained to him the situation for which he was being arrested, insomuch as there were three perpetrators who entered this cab dispatcher's office. I asked Mr. Lee if he would be willing to keep his ears open, not to inquire, or to question this defendant if he was put in the same cell with him, but more or less just to keep his ears open as to the other two perpetrators.

Q. And Det. Cullen, when you made that request of Mr. Lee, what was his response, Sir?

A. Yes, he would.

[36] Q. And did you inform Mr. Lee that you were, as you said, that an arrest was imminent of this defendant, did you inform Mr. Lee that you were going to make arrange-

Selected Hearing Testimony of Detective Walter Cullen

ments to have this defendant, upon his arrest, placed in the same cell with Mr. Lee?

A. Yes, if it was agreeable with him.

Q. Did you have, on July 7th, when you visited Mr. Lee at the Bronx House of Detention, Sir, did you have a photograph of the defendant Joseph Allen Wilson with you?

A. Yes.

Q. Did you display that photograph to Mr. Lee?

A. Yes.

Q. And was that, Sir, to the best of your recollection, the extent of your conversation with Mr. Lee, at the Bronx House of Detention on July 7th?

A. Well, I told him I'd get back to him at another time.

Q. And was that the extent of your conversation?

A. Yes, that was it.

Q. And was that your first conversation with Mr. Lee, with respect to this case, Sir?

A. Yes.

Q. Now Det. Cullen, let me refer you to July 24th, 1970. On that day did you have occasion to again return [37] to the Bronx House of Detention?

A. I did.

Q. And without going into the content of any conversation, did you, on that day, have a conversation with Mr. Lee?

A. I did.

Q. And did there come a time, that your conversation on July 24th, 1970, in the Bronx House of Detention, was over with Mr. Lee?

A. Yes.

Q. Det. Cullen, going back to July 8th, 1970, at the 44th Squad, while you were present with this defendant, at any time, did either yourself or anyone in your presence ever use any abusive or foul language in front of this defendant?

A. No.

Selected Hearing Testimony of Detective Walter Cullen

Q. Did either you or any police officer in your presence ever strike a blow at this defendant?

A. No.

Q. Were any threats made by either yourself or any one else, in your presence, to this defendant, on that day, Sir?

A. No.

Q. In fact, Det. Cullen, was there not some discussion [38] on July 8th, 1970, at the 44th Squad, about supplying this defendant with food and cigarettes?

A. Yes, his brother inquired could he get him something for his brother. I said, certainly.

Mr. Cantor: I have no further questions on direct, on this Huntley hearing of this witness, Your Honor, and I will make a representation to the Court that the witness, Benny Lee, as to which Your Honor took certain testimony, will be produced by the People, as the next witness in this hearing.

Mr. Adler: Judge, may I ask for about ten minutes' recess? I'd like to ask to examine the document, or that was, the book, the detective testified from.

The Court: His memo book?

Mr. Adler: His memo book. Yes.

The Court: Mark it for identification, please. Pages—

The Witness: There is additional notes here, Your Honor, which are xeroxed copies.

The Court: There are?

The Witness: Yes.

The Court: All right. So that, mark that for identification, and then turn it over to counsel.

[39] We will take a short recess. You may step down in the meanwhile, and the defendant is returned upstairs during the recess.

Selected Hearing Testimony of Detective Walter Cullen

Mr. Cantor: Received and marked for identification, People's Exhibit #1 for identification.

The Court: Unless counsel objects [illegible] for identification. And if there is [illegible] in your mind, you can compare it with [illegible]

(At this time the notes were received and marked People's Exhibit #1 for identification.)

(At this time the defendant was remanded and the court stood in recess for ten minutes.)

* * *

[40] Court Clerk: People of the State of New York against Joseph Allen Wilson. People, defense counsel and defendant are present.

DETECTIVE WALTER J. CULLEN, previously been sworn, resumed the stand and continued testifying as follows:

Cross-examination by Mr. Adler:

Q. Detective Cullen, was Detective Dunn there with you at all times?

A. No.

Q. Was he in there some of the time?

A. Yes.

Q. And was that at the time he first gave himself up on July 8, 1970?

A. Yes.

Q. Now, did Detective Dunn make any notes, do you know?

A. In relation to what, Counselor?

Q. In relation to any conversations or anything that occurred when you were present?

Mr. Cantor: On what date?

Selected Hearing Testimony of Detective Walter Cullen

Q. On July 8th?

A. Well, yes, he made, I'm certain he made notations [41] on July 8th, yes.

Q. And he made notations in his memorandum book would you say?

A. Yes.

Q. Where is Detective Dunn now?

A. He's in Mr. Cantor's office.

Q. Now who did the questioning, Mr. Dunn participate in that?

A. Counselor, are you talking to—

Q. I'm talking now at all times of July 8th. Did you—

A. Are you talking about specifically when I was having a conversation with the defendant?

A. Yes, that's right.

A. No, he didn't take any notes at that time.

Q. And was the Chief of Detectives in the room with you?

A. No.

Q. This was a murder case?

A. Yes.

Q. And you had no one else in the room with you to corroborate anything that was said?

Mr. Cantor: I object to the form.

The Court: Objection sustained.

[42] Q. Did you think it important to have anybody with you at the time you questioned this—

Mr. Cantor: Objection, your Honor.

The Court: Sustained.

Q. Now you have certain notations on this paper and I'll indicate them to you and ask you where you put 1, 2, 3, 4 and 4A and so forth, what did that indicate?

A. That indicated where I interposed a question to the defendant.

Selected Hearing Testimony of Detective Walter Cullen

The Court: For the record that reference is to—

Mr. Cantor: People's 1A for identification.

The Court: 1A for identification.

Court Clerk: One.

Mr. Cantor: One, I don't think they broke it up.

The Court: Yes, one for identification.

Q. Now when did you make those notations, 1, 2, 3, 4, 4a and et cetera, with regards to the numbers, small numbers and circles, when did you do that?

A. I did this within this week after reviewing it with Mr. Cantor.

Q. And when did you write the questions on the [43] foot of that memorandum sheet? Was that also [illegible] the same time?

A. Yes.

Q. So that for a period of approximately twenty-one months there was nothing on the paper other than photostats with the exception of your writing; is that correct?

A. The photostats didn't exist for that period of time, Counselor.

Q. Now, but I'm talking about the notations that are on the photostats?

A. Yes.

Q. In ink?

A. Yes.

Q. Those were recently put on, that is within the last two weeks?

A. Yes, they were.

Q. And you made up those questions by refreshing your recollection from the notes that you made?

A. Yes.

Q. Now when did you transcribe these notes, the entire notes?

Selected Hearing Testimony of Detective Walter Cullen

Mr. Cantor: No testimony of any transcription, Judge.

[44] The Court: Sustained.

Q. Well, when did you write them in your memorandum book?

A. On July 8, 1970.

Q. And was the defendant present when you were writing?

A. Yes.

Q. And you wrote in his presence?

A. Yes.

Q. As he was talking to you?

A. Yes.

Q. And he say you do that?

Mr. Cantor: I'm going to object. How could he say what the other man was looking at?

The Court: Objection sustained.

Q. Well, how far was he away from you when you were writing?

A. Two feet, three feet.

Q. Now when you first encountered him or when he first presented himself to you, you asked him did you [illegible] "Do you want to make a statement?" Is that what you asked him?

A. I had to ask that question of him, yes.

Q. And did he say, no, he didn't want to make any [45] statement?

A. Yes.

Q. And thereafter you had him make a statement; isn't that correct?

A. I didn't have him make a statement; he made it.

Q. You asked him to make a statement; did you not?

A. I asked him if he cared to tell me what he did on July 4th.

Selected Hearing Testimony of Detective Walter Cullen

Q. And there was no lawyer present when he made that statement?

A. No, there was not.

Q. And it was after he had refused to make a statement that you had again requested him to do so; isn't that so?

Mr. Cantor: I'm going to object, Judge.

The Court: Objection sustained as to form. It's argumentative.

Q. Well, after he had refused to make a statement you then questioned him further; isn't that right?

A. Yes.

Q. And there was no lawyer present at that time?

A. No.

Q. And there came a time when the Assistant District Attorney from the Bronx District Attorney's Office [46] came up to the precinct; is that correct?

Mr. Cantor: I'm going to object since this post-dates any conversation between this defendant and the officers, Judge, it's entirely irrelevant.

Mr. Adler: Well, the same night, the same day—

The Court: Objection sustained.

Mr. Adler: May I repeat the question for the record, Your Honor, please.

Q. Did there come a time on July 8th in the precinct at which time you and the defendant were present? Did there come a time on that day some hours after you had first met the defendant that the District Attorney's Office was represented by one of its Assistants with a stenographer?

Mr. Cantor: Same objection.

The Court: Same ruling. Sustained.

Mr. Adler: Exception.

Selected Hearing Testimony of Detective Walter Cullen

Q. How long was the defendant in the precinct when he was placed under arrest?

A. How long was he in the precinct?

Q. That's right.

A. He was placed under arrest as soon as he arrived.

Q. And how long after he arrived did he make this [47] statement to you or did he—did you have this conversation for which you took the notes which you have used to refresh your recollection?

A. About ten, fifteen minutes.

Q. Well, now, did you fingerprint him?

A. Did I?

Q. Yes.

A. No. I answered, no, Counselor.

Q. Oh, I'm sorry, I didn't hear you. You did not. And how long after he was in the precinct was he fingerprinted?

A. I didn't fingerprint him.

Q. Well, after he was placed—how long was he in precinct when he was placed under arrest.

A. He was placed under arrest immediately.

Q. Well, now did you know that he was fingerprinted?

A. Yes.

Q. How long after he was placed under arrest was he fingerprinted?

A. I can't recall.

Q. Well, would you say it was an hour?

Mr. Cantor: Judge, I'm going to object to everything that post-dates the statements. It's irrelevant to the voluntariness of the statements.

[48] The Court: Sustained.

Q. Well, was he fingerprinted before or after he made this conversation with you?

A. To the best of my recollection he was fingerprinted after.

Selected Hearing Testimony of Detective Walter Cullen

Q. And how long had you spent with him in making these—in this conversation?

A. Twenty minutes to a half hour.

Q. Now isn't the procedure of the police department to fingerprint a man the minute he's arrested?

Mr. Cantor: Objection, Your Honor.

The Court: Sustained.

Mr. Adler: Exception.

Q. Did you make any notes of any conversation with others with respect to what you testified to this morning?

Mr. Cantor: I'm going to object. It's only this statement of this defendant that's in issue.

The Court: Sustained.

Mr. Adler: I'd just like to know, Your Honor, on the question of credibility whether this man has made any notations or memoranda with respect to any conversations relating—with others relating to what he testified to this morning.

[49] The Court: We understand your application and the objection is sustained.

Mr. Adler: May I have an exception, Your Honor, please?

Q. The fact is, though, Detective Cullen, he never admitted committing any crime; isn't that so?

Mr. Cantor: Calls for a conclusion.

Q. To you?

The Court: That's a conclusion, sustained.

Q. Did he ever make any admission of committing a crime to you?

Selected Hearing Testimony of Detective Walter Cullen

Mr. Cantor: Same objection.

The Court: Sustained.

Q. Were there any statements made to you with respect to the commission of any crime?

Mr. Cantor: Calls for a characterization, Judge.

The Court: Sustained.

Mr. Adler: Exception.

(Counselor Adler conferred off the record with the defendant.)

Q. All these notes that you have in your memorandum, they were made in your own handwriting; is that correct?

A. Yes.

[50] Q. No one else wrote them down or made any additions or modifications to it?

A. No.

(Counselor Adler conferred off the record with the defendant.)

Mr. Adler: No further questions of this witness.

The Court: You may step down at this time. You have no questions, have you, Mr. Cantor?

Mr. Cantor: No.

The Court: All right, we'll resume at 2:15. Remand the defendant in the meanwhile.

(Luncheon Recess.)

* * *

Hearing Testimony of Benny Lee

[52] Mr. Cantor: If your Honor please, continuing on the Huntley hearing, the People call Benny Lee to the stand.

BENNY LEE, an inmate of Greenhaven Prison, New York State, having been called as a witness by and on behalf of the People, was duly sworn and testified as follows:

The Court: Is that Benny?

Court Officer: B-e-n-n-y, sir. Lee, Capital L-e-e.

Direct examination by Mr. Cantor:

Q. Mr. Lee, I'd like to refer you to July 7th, 1970. On that particular date, were you in the Bronx House of Detention as an inmate?

A. Yes, sir.

Q. Do you know a Detective Walter Cullen?

A. Yes, sir.

Q. On that particular date, at the Bronx House of Detention, did you have a discussion with Detective Cullen?

[53] A. Yes, sir.

Q. Tell his Honor, Mr. Lee, what Detective Cullen said to you and what you reply was.

A. Detective Cullen told me that he was investigating a murder and a robbery. And he showed me a photograph.

Q. Photograph of whom, sir?

A. Of Wilson, Mr. Wilson.

Q. Do you see Wilson here in court today, the man you refer to by the name of Wilson?

A. Yes.

Q. Point him out.

A. (Indicating).

Mr. Cantor: Let the record indicate the witness has indicated the defendant.

Hearing Testimony of Benny Lee

Q. Please continue. What did Detective Cullen tell you?

A. Detective Cullen told me he was investigating a murder.

The Court: Keep your voice up, if you will, please.

(Continuing) And that he had a suspect in the murder case.

Mr. Adler: I can't hear. I'm sorry.

The Court: Would you keep your voice up, please [54] I'm having difficulty, and I'm sure counsel is.

Q. Speak to me. I'll stand back here. All right?

A. Yes.

Q. Detective Cullen said that he had a suspect in a murder case?

A. Yes.

Q. And he showed you a picture of the defendant, Wilson; is that correct?

A. Yes, sir.

Q. All right. And what did he tell you, sir?

A. He wanted to know if I knew him, and he wanted to know if there was anything that I knew about it or anything that I could do to help him with the case.

Q. Did Detective Cullen inform you that he was about to make an arrest in that case that he mentioned?

A. Yes. He said he knew who one man was.

Q. Was that the man whose picture he showed you?

A. Yes, sir.

Q. And did Detective Cullen tell you what he was going to do with that man with respect to making arrangements, once he arrested him?

A. Yes. He said he was going— he was pretty sure he would make an arrest within twenty-four hours, and that he would have the man put into my cell in Bronx House of [55] Detention.

Hearing Testimony of Benny Lee

Q. Did Detective Cullen request something of you, ask you to do something?

A. Yes, he did.

Q. What was that?

A. He asked me to listen to the man and to find out, if I could, who were the other two men that were with him.

Q. Did Detective Cullen tell you what he did not want you to do when this man was put in your cell?

A. He said he didn't want me to ask questions or question the man in any way, just to sit there and to listen to him and to see if I could find out the names of the other two men who were involved.

Q. Did you agree to Detective Cullen's request?

A. Yes, sir.

Q. Now, Mr. Lee, when were you arrested on your case and placed in the Bronx House of Detention?

A. On June 24th— 25th.

Q. And did there come a time, after you were arrested and placed in the Bronx House of Detention that your cell was changed up to the sixth floor?

A. Yes, I was on one floor, and they moved me up to Six-South.

Q. And when you moved up to the Six-South floor, [56] and you occupied a cell, when you first came into that cell, were you alone, or did you have a cellmate?

A. No, sir, I was alone.

Q. And for how long a period of time did you remain alone in that cell?

A. Approximately two weeks.

Q. And did there come a time, after two weeks, that you got a cellmate?

A. Yes, sir.

Q. And who was that cellmate, sir?

A. Mr. Wilson.

Hearing Testimony of Benny Lee

Q. And do you remember about one o'clock on that day, when you saw Wilson come into your cell as a cellmate, that there was a conversation, that Wilson said something to you about one o'clock that afternoon when he came in?

A. Yes, he did.

Q. That was the first day that he was your cellmate?

A. Yes.

Q. Tell the Judge what Wilson said.

A. He came in about one o'clock. It was after lunch. And he was very upset about being moved up to the sixth floor. The garage at which the crime was committed faces [57] that part of the Bronx County, and you can look right from my window, from the window right down in [illegible] garage.

Q. You can see that garage on [illegible] window in your cell?

A. Yes, sir.

Q. So he was upset about that?

A. Yes.

Q. And did he start speaking?

A. Yes, he spoke to me. And he said that he had been accused of a robbery and a murder at this garage [illegible] facing us, and he was upset about the fact that [illegible] moved from one cell upstairs to another that faced the garage.

Q. And what did he say about the robbery and the murder?

A. He told me that he was accused of this robbery and murder at the place where he formerly worked, and he knew everybody there, and his brother and his uncle also worked in the place. And then he went on to say that on the night of the crime, he went to— he went over there to see his brother, and he met two men outside of the place and the two men asked him— one of the men asked him did he have— did they have a soda machine [58] inside and he

Hearing Testimony of Benny Lee

told the men yes, they had a soda machine and he directed them to a soda machine. After the [illegible] went inside, he followed them inside and was [illegible] one of the men that worked there that knew him [illegible] ing there. He heard a loud— loud report, and he saw the two men running from the office [illegible] was putting money in his pockets—both men were [illegible] money in their pockets and dropping money on the [illegible]. So he walked over and he picked up some of the money [illegible] the two men had gotten, by this time, outside and they [illegible] running away. He picked up some of the money and followed the two men outside, and he was looking in the direction that the two men were running. Then he walked away from the— from the place.

Q. Now, after he told you that, what did you respond, if anything, to the defendant?

A. I think I remember telling him that the story wasn't— it didn't sound too good. Things didn't look good for him.

Q. And what was his response to that?

A. Well, he didn't say anything, but he stuck to the story. He didn't change anything. And he said that was it, that's what happened.

Q. Now, prior to his telling you this story, [59] Mr. Lee, did you in any way question this defendant?

A. No, sir.

Q. Did you put any questions to him whatever?

A. No, sir.

Q. For how long a period of time, Mr. Lee, [illegible] in that cell with this defendant, Joseph Allen Wilson?

A. About a week or ten days.

Q. Now, passing on to the balance of the time you were in that cell with him— You have told us he gave you a story on the first day. During the [illegible] of that time, did the defendant make other statements to you?

A. Yes, he did.

Hearing Testimony of Benny Lee

Q. Now, these other statements, Mr. Lee, at any time during the course of the period that this defendant made other statements to you, did you at any time put questions or inquiries to him?

A. No, sir.

Q. Now, there came a time that you got a second story from this defendant; is that correct?

A. Yes, sir.

Q. About how many days passed from the first day until the time that you had that second story from him?

A. Oh, just about two or three days.

[60] Q. Now, tell his Honor what this defendant [illegible] you within the next two days.

A. Within the next two days, the story changed [illegible] bit. Then he said, in regards to the two men did know the two men, and that he had planned [illegible] with the two men and— he had planned the robbery [illegible] the two men. He had planned it. He knew the layout of the place and he thought it would be an easy touch [illegible] weekend.

Q. Well, did he tell you anything else about the facts of the crime?

A. Yes, he went on— He told me about— He went inside at first to case the place, to look and see if everything was all right. Then he went back outside and told the two men that everything was cool, that they could take the place off with no trouble. The three of them came back inside, stopped at the soda machine, had sodas, looked around some more, and went to the office and "We shot the man."

Q. Is that his term. "We shot the man"?

A. Yes, sir.

Q. And after he said, "We shot the man," what then did he say?

A. "We picked up the money and left."

Hearing Testimony of Benny Lee

[61] Q. And did he tell you by what way, by what [illegible] he took when he left?

A. Yes, sir. They went through the park and took [illegible] on the other side of the park. They did stop in the park for, oh, to get the money together or something and then they— on the other side of that little park they took a cab on Grand Concourse to I think it was Tinton Avenue and 165th Street.

Q. And did he tell you where he was while the police were investigating this crime?

A. Yes. He told me that the police came to his house the next morning, broke down his door and scared everybody in the neighborhood, sealed off the whole building, scared everybody in the neighborhood, and they couldn't find him, that he was hiding right under their noses all the time.

Q. And did he tell you anything about his arrest, about his arrest by the police?

A. Yes. He said that when he found out the police were looking for him, he got pretty scared and decided to turn himself in.

(Continued on the following page.)

[62] Q. Was he afraid of what might happen if the police found him?

A. Yes he was afraid that the police would kill him because of the manner in which they came and—[illegible] arrest him, that is.

Q. Now, Mr. Lee, during the course of this second story that the defendant gave to you, you testified that you did not question the defendant, tell his Honor how this defendant came about telling you that second story during that two or three day period after the first day that you were together in the cell.

Mr. Adler: That's objected to if your Honor please.

Hearing Testimony of Benny Lee

The Court: Objection overruled.

A. The defendant had a visit from his brother.

The Court: Beg pardon? I didn't hear that.

The Witness: A visit from his brother.

The Court: All right.

The Witness: And he was upset over the fact that his brother had come and said that his family was saying that he had killed Sam and why did he kill Sam and this upset him very much and that would start him to talking about different things, about the crime and different things.

[63] Q. And once he talked about the fact that his family was upset that Sam had been killed?

A. Yes.

Q. Did that lead him into the second story?

A. Yes.

Mr. Adler: I object to the leading.

The Court: Sustained. Don't lead.

Q. In any event, during the nine or ten day period that you were together in the same cell with this defendant, Mr. Lee, did you at any time press inquiries or questions to this defendant to uncover any information?

A. No, sir.

Q. At all times all of the things that you've related to his Honor here today in court, were those the statements that were initiated by this defendant Joseph Allen Wilson to you while you were in that cell?

A. Yes, sir.

Mr. Cantor: I have no further questions on direct examination.

*Hearing Testimony of Benny Lee**Cross-examination by Mr. Adler:*

Q. Mr. Lee, what's your business or occupation?

A. Oh, I'm a bricklayer.

Q. And are you in custody of the police now?

[64] A. No, sir.

Q. Did you make a deal with the police?

A. No, sir.

Q. Did you know Detective Cullen before he came before he visited you?

A. Yes, sir.

Q. What were you charged with?

A. Robbery.

Q. First degree?

A. Third degree.

Q. Third degree. Did you have a weapon?

A. Yes, sir.

Q. Did you have any previous conviction?

A. Yes.

Q. What was that?

A. Once for robbery.

Q. Anything else?

A. Unlawful entry.

Q. Did you have another one?

A. I've several of them all together.

Q. Now, did you have any discussions with Detective Cullen before he came to see you?

Mr. Cantor: When is this, Judge; are we discussing July 7th?

[65] Mr. Adler: July 7th.

Mr. Cantor: The question is did he see Cullen prior to July 7th?

Mr. Adler: That's right.

The Court: That's the question.

Mr. Cantor: I object, Judge; I'm going to make a concession here that this man was an agent of the

Hearing Testimony of Benny Lee

police admittedly. I don't deny that for a moment so anything that transpires prior to 7th is irrelevant.

The Court: Do I understand you to say your position is this man was an agent of the police.

Mr. Cantor: Exactly, Judge. I concede that.

Mr. Adler: Very good.

The Court: All right.

Q. When he spoke to you, did you warn him of his rights?

The Court: Mr. Adler; he's not a police official.

Mr. Adler: I understand that but he's an agent of the police.

Mr. Cantor: I'll concede that Judge for the purposes of the record there were no Miranda warnings. No Miranda warnings.

Q. Did you ever tell him you were working for the police?

[66] A. No, sir.

Q. Just had him talk to you?

Mr. Cantor: Objection to the form of that question your honor.

The Court: Sustained as to form.

Q. Well, did you talk it over with Detective Cullen as to taking any notes of your discussion?

A. Talked it over with him?

Q. Yes. Withdrawn. Did you make any notes of what your discussion with the defendant was?

A. Yes, I did.

Q. Where did you do that?

A. Where did I do it?

Q. Yeah.

A. Oh, in Bronx County.

Hearing Testimony of Benny Lee

Q. What's that sir?

A. In Bronx County.

Q. Do you have those notes with you?

Mr. Cantor: I have a copy of them, Judge.

Mr. Adler: May I see them?

Mr. Cantor: May we have them marked for identification?

The Court: Would you like them counselor?

Mr. Adler: I'd like to see.

[67] The Court: Mark them for identification, show them to counsel please.

Mr. Cantor: That would be People's 2, Judge and it's only one side of People's 2.

The Court: For identification.

Court Officer: People's 2 marked for identification.

[One side of paper marked for Identification.]

Q. I show you this paper and I ask you, is this in your handwriting?

A. Yes.

Q. Can you read it?

A. Yes, sir.

Q. Now, did you hand that to the police, to Detective Cullen?

A. Yes I did.

Q. And where did you hand that to him?

A. On the second time he came; second time I saw him.

Q. And how long after July 7th 1970 was that?

A. It was about three weeks, three and a half weeks maybe.

Q. And were you promised any leniency if you cooperated with the district attorney?

A. No, sir.

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[68] Q. You just did this voluntarily?

A. Yes, sir.

Q. As a citizen, a good citizen?

Mr. Cantor: Objection to the form, Judge.

The Court: Sustained as to form.

Mr. Adler: May I have that please?

Q. Now, would you tell us in substance what's written on here? I can't read it Judge, that's the only reason.

Mr. Cantor: I'm going to object.

Mr. Adler: I'll let your Honor see it.

The Court: It's not in evidence but perhaps the witness may be able to read it since they are his notes I believe.

Q. Where did you write this?

A. Where did I write it?

Q. Yeah, People's Exhibit 2 for identification?

A. I wrote it over a period of days. Those are just notations that I made.

Q. And you didn't write them in the cell, did you?

A. Some of them.

Q. Where was the defendant when you wrote those?

A. He was there.

Q. You wrote them, he saw you write those?

A. Yes. Of course.

[69] Mr. Cantor: Objection. How can he testify as to what the man saw; he only has his own eyes.

The Court: Yes.

Q. How far away was he when you wrote this?

A. In jail people mind their business. [Illegible] eyes—

Q. I didn't ask you that. How far was he [illegible]?

A. Maybe three feet.

Hearing Testimony of Benny Lee

Q. Did you tell him you were making any notes about him?

A. No.

Q. Did you plead guilty to your robbery charge?

A. Yes.

Q. Were you sentenced?

A. Yes, sir.

Q. Given a suspended sentence?

A. No, sir.

Q. How much time were you given?

A. Four years.

Q. How much time—are you in prison now?

A. Yes.

Q. Incidentally, were you given any drugs while you were in jail?

A. No, sir.

[70] Q. Were you addicted at any time?

A. Yes, sir.

Q. Now, did you talk it over with Detective Cullen before you came here today?

A. No, sir.

Q. You talk it over with Mr. Cantor before you came here today?

A. Yes, just briefly.

Q. How long ago?

A. Well, yesterday.

Q. Yesterday?

A. Yes.

Q. And before that, did you speak to Mr. Cantor about it?

A. No, sir.

Q. You speak to any member of the district attorney's office?

A. No, sir.

Q. About this case?

A. No, sir.

Hearing Testimony of Benny Lee

Q. And when did you last speak to Detective Cullen about it?

A. Oh, about two years ago.

Q. And since that time did you discuss it with him?

[71] A. No, sir.

Q. Did you discuss it with him today?

A. No, sir.

Q. Yesterday?

A. No, sir.

Q. Did you discuss it with any member of the police force within the last 48 hours?

A. No, sir.

Q. And within the last two years?

A. No, sir.

Mr. Adler: All right, I have no further questions.

Redirect examination by Mr. Cantor:

Q. Now, Mr. Lee, when Detective Cullen came back on July 24th, did you discuss what this defendant had told you and tell that to Detective Cullen?

Mr. Adler: I object to that, your Honor. He said he didn't discuss it.

Mr. Cantor: No, there is a point that I want to pursue and explain that's been delved into on cross-examination and that is his discussions with various members of the Police Department.

The Court: Overruled.

[72] Mr. Adler: Exception, your Honor.

Q. Did you on July 24th when Detective Cullen back to the Bronx House of Detention tell Detective Cullen what this defendant had told you?

A. Yes. I thought I said that before that Detective Cullen was back and I gave him the slip.

Hearing Testimony of Benny Lee

Q. And Mr. Lee, aside from yesterday when you and I spoke briefly about his case, approximately ten days ago—

A. Yes.

Q. Did you and I have a discussion in my office?

A. Yes, sir. When I came down from Greenhaven.

Q. And when you and I had this discussion in my office about ten days ago when you came down from Greenhaven did you tell me what this defendant told you in that cell?

A. Oh, yes, sir.

Mr. Cantor: I have no further questions.

Recross-examination by Mr. Adler:

Q. Well, now, that was ten days ago? Isn't that right?

A. Yes.

Q. You remember my asking you a few minutes ago, did you last speak to the district attorney, you said only [73] yesterday?

Mr. Cantor: I'm going to object.

A. Yes I did say that Judge. I was—

The Court: Just a moment please. Objection is sustained as to form of the question. That's argumentative.

Mr. Cantor: Can we strike the answer, your Honor?

The Court: Strike the answer if any.

Q. Well, then you did speak to the district attorney ten days ago?

A. Yes, sir.

Q. Did you forget that when I asked you the question?

Mr. Cantor: Objection.

The Court: Please don't argue with the witness, counsel.

Hearing Testimony of Benny Lee

Mr. Adler: Except as a matter of credibility, Judge, I'd like to test it.

The Court: I understand that very well but please don't argue with the witness.

Mr. Adler: Very good; I'm sorry, sir.

Q. Well, did you forget when I asked you the question, when did you last see the district attorney office?

[74] Mr. Cantor: Objection your Honor.

The Court: Well it's established that he spoke to the District Attorney within the last ten days is it?

Mr. Cantor: He's testified twice, ten days and yesterday.

The Court: Take it on from there.

Mr. Adler: This is the second time Judge he did it and I just want to—

The Court: Counsel, I'm following your cross examination very closely.

Mr. Adler: Thank you, Judge.

Q. Just to clarify in my own mind, between—in the last 20 odd months, you never discuss this case with anybody?

Mr. Cantor: I'm going to object unless the question incorporates the reference from July the 7th—July 24th, the last time the witness spoke to Detective Cullen until two weeks ago when he first spoke to me.

Mr. Adler: Very good, I will take that.

The Court: Rephrase it.

Q. From July 7th 1970—

Mr. Cantor: 24th.

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[75] Q. Or July 24th, 1970, until approximately two weeks ago, did you discuss this case with anyone?

A. No, sir.

Q. Did you use any papers to refresh your recollection about what was said within the last two weeks, as to what you had discussed with Detective Cullen and with the defendant?

A. Did I use any papers?

Q. Did you use anything to refresh your recollect—did you read any papers?

Mr. Cantor: It's improper recross, Judge. I never touched on the redirect.

The Court: Oh, I'll permit it.

A. Did I read any papers?

Q. That's right. To remind you of what was said by him?

A. No, sir, no.

Q. Just relied on your own memory?

A. Yes.

Mr. Adler: No further questions.

Redirect examination by Mr. Cantor:

Q. Now, when you came down and when you spoke to me at approximately 10 days ago, Mr. Lee, did I show you [75a] People's number 2 for identification?

A. Yes.

[76] Q. And did you inform me that that was your notes?

A. Yes, sir; I did.

Mr. Cantor: No further questions.

Mr. Adler: No further questions.

The Court: You may step down.

(Witness complies.)

Hearing Testimony of Benny Lee

Mr. Cantor: If your Honor please, that concludes the People's Case on the Huntley hearing.

The Court: All right.

Mr. Adler: Your Honor please, I would like to move to dismiss on the ground, that is to vacate any statements which may be brought in evidence from the witnesses on the grounds that there appears that this was some influence which is beyond the permissive rights in that the defendant did, when he first apprehend—was apprehended, when he gave himself up to the Detective Cullen, he did refuse to make any statement; and then was further questioned.

Mr. Cantor: Judge—

Mr. Adler: —without counsel.

The Court: May I interrupt, counsellor?

Mr. Adler: Yes.

The Court: Will counsel step to the bench.

[77] Mr. Adler: Yes.

(Whereupon Assistant District Attorney Cantor and Counsellor Adler approach the bench and confer with the Court off the record and out of the hearing of the defendant.)

Mr. Adler: I rest.

The Court: As far as—

Mr. Adler: As far as the hearing on the Huntley Hearing is concerned.

Mr. Cantor: The People rest, Judge.

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[79] Mr. Cantor: If your Honor pleases, the People concede that the witness Benny Lee was a police agent and was a cell mate of this defendant's.

I think the evidence is controverted that Benny Lee was instructed by the police to physically remain in that cell, but not take any overt action, and not take any steps, and not question or pose any inquiries; and Mr. Lee, of course, testified in an uncontroverted fashion that he followed the police mandates and that he did not question, and that he did not pose inquiries. He merely stayed in that cell. It would be as if a tape recorder were in that cell; and he absorbed, without questioning, he absorbed statements made by this defendant, initiated by this defendant, in a spontaneous, gratuitous fashion.

Now, as this Court is well aware in the case of People versus Mirenda, the Court of Appeals condemned statements made by a defendant to a cellmate, where that cellmate intentionally elicits or induces [80] statements and to quote the language of Mirenda, "Statements made by a cellmate to another, deliberately placed in proximity to the defendant in order to get statements, in order to get statements, or in the words of the Supreme Court of the United States in Messiah versus the United States, in which the Supreme Court of the United States condemned the efforts of a police agent who deliberately elicited or induced statement from a defendant; and the police action in that case, through the person of the agent, was deemed to be an abridgment of the defendant's constitutional rights."

The distinguishing characteristic in this case, Judge, in this case is more in harmony with People

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versus Kaye and People versus McKee, Court of Appeals of this State.

The Court: Post or prior to Miranda?

Mr. Cantor: Post Miranda, post Miranda.

The Court: I'm talking about the Supreme Court, Miranda, not Mirenda.

Mr. Cantor: Miranda, yes, Arizona versus Miranda, these two cases—People versus Kaye and People versus McKee in 25 New York Second; and [81] the date of those cases are 1969, Judge, which indeed, post-Miranda.

The Court: All right.

Mr. Cantor: In any event, those cases turn upon spontaneous, gratuitous statements made by a defendant, all be it, the defendant is in a custodial setup.

The Court: Yes.

Mr. Cantor: —whether in a police station or whether it is in a jail, custodial is custodial. The fact that one defendant is in a jail and another is in a police station; or another is on a street corner being questioned by police, if the situation is custodial, the Court of Appeals, and indeed, the Supreme Court has condemned any statements made by a defendant to either the police or agent of a police with one, judge, one exception; and we have that exception, uncontroverted in this case.

The Court: May I interrupt you, one point further?

Mr. Cantor: Yes.

The Court: Those two cases cited, are they prior to Mirenda?

[82] Mr. Cantor: They're post Mirenda.

The Court: Post Mirenda.

Mr. Cantor: Post Mirenda. Mirenda, if your Honor please, was reported in 23 N.Y.2d People

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versus Kaye and People versus McKee in 25 N.Y.2d Judge.

If your Honor will allow me, if I may read language from People versus McKee, and I'll quote the decision of the Court, and this is a situation, Judge, where the defendant in People versus Kaye—

The Court: Page?

Mr. Cantor: Well, it's at page 144, Judge. This is a situation where the defendant had been arrested by the police.

The Court: Yes.

Mr. Cantor: He had been surrendered by his attorney and the attorney unequivocally informed the police that it was the attorney's wishes that the police not interrogate and not question that defendant.

The Court: Yes.

Mr. Cantor: Whereupon the defendant was arrested by the two officers and taken to a car; and in the car he was driven to the police station. [83] Now, on the way, Judge, in that car, in the presence of the two police officers, the defendant began initiating a conversation, during the course of which the officers interposed questions as to [illegible] als, time, and place and whereabouts.

The Court of appeals said as follows: "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."

"There is no requirement that the police stop a person who enters a police station and states he wishes to confess to a crime, or a person who calls the police to offer a confession, or any other statement he desires to make; volunteered statements of any kind are not barred by the fifth amendment, and

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their admissibility is not affected by our holding today."

Judge, the Court of Appeals recognized in this case, *People versus Kaye*, that the defendant was in custodial interrogation; he was in a custodial setting, I should say he had already been arrested. His lawyer had already advised the police not—not to question the defendant; the defendant initiated the conversation; and the officers—much more [84] grivous situation than we have here with Benny Lee, the officers then propounded a series of incidental questions; and notwithstanding that, the Court of Appeals held that the defendant insisted on talking." This is a quote. "And the detectives requested that the defendant start from the beginning, if he wanted to tell his story; does not constitute custodial interrogation within the meaning of *People, of Miranda versus Arizona*.

The key distinction, Judge, and the distinction that I'm hoping to impress this Court with is that Benny Lee was not only instructed not to initiate the conversations, but Benny Lee lived up to that instruction; and if it will please your Honor, I would submit that Benny Lee was nothing more, your Honor, than an individual who stood there or sat there or remained in that cell with this defendant; and this defendant, for reasons best known to him, whether he wanted to unburden his soul or for whatever reasons, we've had testimony of the fact that the cell overlooked the garage where the crime was committed, and this was sort of a catalytic agent, according to Benny Lee's testimony that started the defendant's spontaneous [85] talking; and it was self compelling and gratuitous.

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The point being, Judge, that this defendant initiated, volunteered spontaneous statement, and that exception has survived *People versus—I should say Arizona versus Miranda*; and the *United States versus Escobito*; and that exception still exists in our case law today, that a man can always, to the police, at any time, spontaneously for whatever reason motivates him in his own mind, can always come forth and make statements; and if there is no State action, if there is no inquiry, if there is no questioning, if there is no interrogation by either the agent of the police or by the police, those statements gratuitously offered by a defendant is admissible.

That brings me to *People versus McKee*, also a post-Miranda case and a post *Mirenda* case, New York Court of Appeals.

And this was the situation where an individual was a suspect in a murder case. He had been called in. He had been questioned, I believe, and he was aware of the fact that he was a suspect in a murder case and he was represented by an attorney and the attorney informed the police in that case that the [86] police would have had nothing more to do with his client, and that the police should not pursue the matter any further.

However, one day on the street, there was a coincidental meeting between the police and the defendant in *People versus McKee*, and at that particular time the police baited this defendant by telling him that "You're not dealing with an old lady now," referring to the deceased in that case, "... that you're dealing with grown men."

And at that particular time there was a street conversation and the defendant blurted out the admission, this is a quote, the defendant blurted out

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the admission, "I did it, but you guys can't prove it."

The Court goes on to note that significantly it was the defendant who initiated the verbal dual. We have a dual in this case—in our case we have no dual. It is entirely unilateral. Benny Lee is saying nothing. This defendant is doing all of the questioning.

The Court goes on to say in *People versus McKee* "It was the defendant who commenced the verbal attack upon Patrolman Monroe; and it may be [87] fairly said that the admission which resulted from the argument was the product of the defendant's own bravado.

Well, in the McKee case we have a boastful defendant, showing his bravado. In this case, the Wilson case, we have a man, either so unnerved by the sight of the garage, out of the window of the cell, that he goes on and it spurs him on, and it's a catalytic agent—was so unnerved by the fact that he's transferred for no apparent reason to the cell on the sixth floor from his previous cell, both of which reasons were testified to in uncontroverted fashion by that witness Benny Lee—in any event there's an unburdening of facts in this defendant's ken of knowledge to Mr. Benny Lee; and Benny Lee is not even involved in a dual. Benny Lee is not even interposing incidental questions as he did in the Kaye case.

Lastly, Judge, it takes me to Supreme Court of the United States case 1971, again post *Miranda*, post *Miranda*, *Procunier Atachley*, and the citation of that case, if your Honor please, is 400 U.S. at 466, wherein we have a situation in that case, where there was a police agent, admittedly Benny Lee was [88]

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a police agent, and the Court on a habeas corpus proceeding, reviewing a lower Federal Court granting of a habeas corpus of the writ of habeas corpus, and overturning that lower court order, held that the pertinent test is whether the police agent deliberately, by acts of interrogation, by acts of inquiry, by acts of questioning deliberately elicits or adduces a statement from a defendant, whether the statement elicited from the defendant is a product of coercion; and in this particular case, they ruled it was not the product of coercion, that it wasn't the product of a man propounding a series of questions, of overburdening a defendant with interrogation.

The point being, Judge, and I'll draw my remarks to a close, very briefly, if your Honor please, Benny Lee was the recipient of a gratuitous spontaneous volunteered statement, pre *Miranda*, post *Miranda*. That exception had always existed and it still exists today; and that's why, your Honor, I ask this Court to rule that statement admissible.

The Court: Counsel—

Mr. Adler: If your Honor please, May I just [89] say, controverting the position stated by my good colleague, he talks about a voluntary statement.

I say to your Honor that this was—could not be voluntary—voluntarily made, even assuming that it was made, which we deny, because to be voluntary, one must know all the facts; and he certainly didn't know that this man, Benny Lee, was operating as an agent of the police.

In the cases which have been discussed by Mr. Cantor, he talks about a party being boastful or who insisted upon making statements to the police.

Our client is neither boastful nor insisted on making any statements, as evidenced from the testimony

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given up; but what happened here, that there was a setup, and it was made—it was made after July the 9th, at which time—

The Court: Excuse me, counsel, are you sure about that date? I understood the July 7th—

Mr. Cantor: I think the final—

Mr. Adler: The final statement was made about the 24th as I understand.

The Court: You mean the statement was made—

[90] Mr. Adler: Yes.

The Court: I thought you were talking about the—the conversation with—by Detective Cullen with Mr. Lee.

Mr. Cantor: That's on the 7th.

Mr. Adler: That's on the 7th.

The Court: That's on the 7th.

Mr. Adler: I'm talking about Benny Lee, statement made while he's incarcerated.

The Court: I misunderstood you.

Mr. Adler: I say that was made after July 9th; and July 9th was the date of arraignment at which time he did have counsel; and it was at least made after the time that he was represented by counsel.

The Court: Yes.

Mr. Adler: And as such, I say it was violative of his constitutional rights.

Further, these came up after he was under arrest, and at a time after he—while he was being incarcerated; and after his counsel had been appointed for him, and without warning; and I say these cases are differentiated from a situation which he calls a party unnerved, a party, and I said before cannot voluntarily make a statement [90a] unless he knows all the facts; and the defendant here could not possibly have known all the facts because he didn't know that

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Lee was working as an undercover agent for the police; and as an undercover agent for the police, I say he takes the position, and places himself in the same position as if he had been a police officer.

[91] Mr. Adler: As such, I ask that you strike out any testimony with reference to any statements made with respect at least to Mr. Lee.

The Court: All right, the Court reserved decision. We'll continue this matter tomorrow morning.

Mr. Cantor: Judge, can we approach?

The Court: Yes.

Mr. Cantor: Very well.

(Whereupon, there was a discussion off the record at the bench, among the Court, Mr. Cantor and Mr. Adler.)

The Court: As the Court has indicated, we're reserving decision until tomorrow morning in connection with the Huntley hearing.

* * *

Hearing Court's Decision

[141] Court Clerk Kurtz: People of the State of New York versus Joseph Allen Wilson; People, defense counsel and defendant are present.

The Court: The Court will now render its decision in connection with the Huntley Hearing. In this Huntley Hearing there are two questions for the Court to resolve. The first has to do with alleged statements made by the defendant to Police Officer Cullen and the second with respect to alleged statements made by the defendant in the presence of one Benny Lee.

As to the alleged statements made by defendant to the police officer, this Court finds that prior to his making such statements the police officer complied with the requisite Miranda warnings and accordingly this Court finds beyond a reasonable doubt [142] that said statements made by the defendant to the police officer were voluntary and in no way abridged the defendant's Constitutional rights.

With respect to the alleged statements made by defendant in the presence of Benny Lee, it appears that the defendant was placed in a cell with Benny Lee. Prior to defendant's arrest, the police spoke to Lee who at the time was an inmate of the Bronx House of Detention and asked him if he would act as a police agent and report to the police any statements made by the defendant in Lee's presence about the crime in question. He acceded to this request. At the time he was advised that he was to ask no questions of the defendant about the crime but merely to listen as to what defendant might say in his presence. Mr. Lee so testified and stated that he had at no time asked any questions with respect to the crime but only listened to defendant and made notes regarding what the defendant had to say with respect to the crime in question.

Hearing Court's Decision

This Court finds that he, Lee, so acted and, accordingly, no interrogation was conducted by Lee of the defendant at the time they were cellmates. During the period they were cellmates, the defendant [143] reportedly made certain exculpatory statements. The question to be resolved is whether or not what defendant said in Lee's presense is to be suppressed.

This set of facts is distinguishable in the Court's opinion from *People versus Mirenda*, 23 N.Y.2d 439 at page 449, where the Court stated and I quote: "Statements made by a cellmate to another deliberately placed by the prosecution in proximity to the defendant in order to get statements would be a violation of a defendant's rights."

In *Mirenda*, it appears that the defendant was interrogated by the cellmate. Here he was not. The Court is persuaded by the fact that the defendant's utterances in Lee's presence were spontaneous and not a result of any interrogation by Lee. Any volunteered utterance by a defendant to anyone including a police officer or police agent, is admissible and should not be suppressed. Quoting from *People versus Kaye*, 25 New York 2d 139 at page 145, "no Court has yet held that a police officer must take affirmative steps by gag or otherwise to prevent a talkative person in custody from making an incriminating statement within his hearing".

Accordingly, the Court finds beyond a reasonable [144] doubt that the utterances made by defendant to Lee were unsolicited, and voluntarily made and did not violate the defendant's Constitutional rights and accordingly the motion to suppress same is denied. Of course you have an exception.

. . .

Selected Trial Testimony of Detective Walter Cullen

* * *

[371] Q. So you were left alone in that Squad Commander's Office after advising this defendant of his rights with this defendant?

A. Right.

Q. And describe the interior, the furniture of that Squad Commander's Office, if you will, please.

A. There are two fairly large desks in the Squad Commander's Office. As you enter the Squad Commander's Office, one desk is to your right. The other desk is to your right but they're back to back. So if you're sitting at that desk, and I was sitting at this desk, we would be facing one another. Also, additional chairs in the office. There's a chair right next to the desk I was sitting at. There are filing cabinets, telephones, bulletin boards and—

Q. You were seated at a desk, sir?

A. I was.

Q. And where was this defendant?

A. He was seated at the desk alongside me.

Q. Now, after you asked this defendant if he would be willing to tell you his whereabouts on July 4, [372] and he said he would, what was the question—what was the first question that you asked him?

A. I then asked if he was working, and he replied that he was—that he had worked in—he was a stock clerk in the garment industry; however, he was unemployed at that time. He then went on to say— If I refer to my record, Your Honor?

The Court: You may.

A. (Continuing) That he left his home about 2:30 or 3 o'clock on that morning of July 4, 1970.

Q. I wonder if you would keep your voice up. You trailed off there.

A. I'm sorry.

Selected Trial Testimony of Detective Walter Cullen

Q. He said he left his home?

A. He left his house about 2:30 or 3 o'clock that morning.

Q. Now, Det. Cullen, as this defendant was speaking to you, were you taking notes, sir?

A. I was.

Q. And is that in the book that you have presently before you?

A. It is.

Q. Continue, sir.

A. He then continued and said that he stopped at an [373] after-hours place, and I interposed a question here. I asked him where was that. And his reply was on Westchester Avenue between 158th and Union Avenue. He met some people there and asked them what was happening. They told him nothing was happening upstairs. He then continued on. I then walked over to the garage to see my brother. When I got to the garage, I met my uncle, Rudolph Jackson, who told me my brother wasn't there. I talked to him and some other men about when I was pumping gas there on cold days. My uncle left. And then I went to the back to get me a soda. When I got back there two men were drinking soda. I then interposed a question and asked him to describe the two men and he continued. The first one was male, Negro, twenty to twenty one, thin face, jutting ears, five foot eight, 145 pounds wearing brown knit cap, beige zippered golf jacket, dark brown turtleneck shirt, brown pants, low cut playboy shoes, dark, ith a buckle. Number two man was male, Negro, twenty-five—twenty-four, twenty-five, six foot or six foot one, heavy-set, about 175 pounds, medium complexion, mustache, and goatee, black wavy hair, no hat, black zippered jacket, closed, dungarees or blue pants, white low-cut tennis shoes. Then he went on to say the first guy, and I interjected another question [374] there and said, "Well, he's Number One."

Selected Trial Testimony of Detective Walter Cullen

And he then proceeded to say Number One had his soda and was opening it. Number Two was getting his out of the machine. Then I got mine. I think it was Fresca. I don't know what the other two were drinking. I took my soda in the back to look for my brother's tool box. I didn't find it. I was looking at the pictures on the wall and just looking all around. There was a mechanic working on a cab. I told him I was Mike's brother and engaged in idle conversation. At this point, I interjected a question. I asked what the conversation was and it was just conversation about repairing cars, and I put down idle conversation. That was my word.

[375] A. And then he continued. Then I said good night, then went to the dispatcher's office, to say good night to Sam. As I went through one door, going through the other door, I heard two shots.

Q. What did you say, "As I was going through one door going to the other door" or—

A. May I reflect back, your Honor?

The Court: Yes.

A. As I went through one door, going to the other door, I heard two shots. Then I went into the dispatcher's office and saw number one going through the window and I froze by the cigarette machine. Then number two came from the outside where the gas pumps are and number one started handing money to number two who was taking it and placing it in his jacket pockets, pants pockets and in his belt. Then number one came back out through the window and picked up the money from the inside in his arms. Then they ran and I ran. At this point, I interjected another question, I asked why did he run, and his reply was I was afraid I would get blamed. To Walton Avenue, and then started to walk, left, on Walton Avenue. Half-

Selected Trial Testimony of Detective Walter Cullen

way up the block and through the park and came out on the Grand Concourse. Then went south to about 151st Street.

Q. Is that the defendant's description of the route he [376] took when he ran, sir?

A. Yes.

Q. All right, continue.

A. And west on 151st Street to the Melrose Project, walked through and then made it to 790 East 158th Street, my mother's house, but I didn't go up. I then went to the donut shop on Prospect Avenue between 160th Street and Longwood Avenue. Stayed there about 20 minutes. Then I just walked up to 163rd Street, over to Southern Boulevard and then walked around in that area by myself. At this point, I injected another question; I asked him, did you get wet in the rain; his reply was what rain; and I said, oh, I thought it rained that night; his reply was I don't recall it raining. And about 10 a.m. I went to Wayne and Gale's house. I injected a question there and asked him where was that and his reply was 906 Girard Avenue, Apartment 1A; when I arrived I woke them both up; I asked him at this point who answered the door and his reply was Wayne answered the door and Gale remained in bed. Wayne let me in and I sat on the couch and I said to Wayne, I think I'm in a little trouble and said I'll discuss it with him later. He and Gale were sleeping in the living room and Wayne went and fixed me a couch in the bedroom. Then I lay down and was half awake and half asleep; about 12:30 or one, the defendant [377] said Gale but corrected himself and said Clair from upstairs came in and woke me up and said I hear you're in a little trouble and I said I don't want to discuss it; then we had general conversation. As this point I asked what was the conversation about and it was about them taking a trip or these people that lived in premises here taking a trip to Bear

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Mountain with the kids for the holiday weekend. Then Wayne brought me in some breakfast, four fried eggs, bacon, biscuits, coffee. Then Wayne, then Wayne and I left, about two-thirty or three p.m., and went for a car ride in a car that Wayne's mother rented for me. Wayne parked the car between 160th and 161st Street and Tinton Avenue and then I went up 160th Street to Union Avenue, made a right, down to 158th Street and walked back up to Union Avenue and met Raymond; and while I was talking to Raymond, my brother came running up to me and said, man, what's happening, and I replied nothing's happening and he said Sam is dead and that I'm the only one identified for being on the premises. I said I was on the premises and was there when it went on but I didn't want to discuss it. Then he told me that the cops had broken down my door and had bullet proof vests and guns and said that I was armed and dangerous and that really shook me up. Then I told him I'll call you later and at this point he said [378] that's all and I said that's all! Do you want to tell me what you did between July 4 and July 8th; he said, no, that's all.

Q. Detective Cullen, are you acquainted with that donut shop by Longwood Avenue?

A. Yes.

Q. How long would it take sir at a normal pace walking to walk from the garage at 121 East 151st Street to that donut shop?

Mr. Adler: I object to that, conjecture.

The Court: Objection overruled.

Mr. Adler: Exception.

A. I would say at least 45 minutes.

Q. Detective Cullen, you were first called into this case on July 4th, 1970, is that correct?

A. Yes.

Selected Trial Testimony of Detective Walter Cullen

Q. On what date from July 4th on did the name of this defendant come up in your investigation?

Mr. Adler: I object to that.

The Court: Sustained.

Q. Detective Cullen, do you know a man by the name of Benny Lee?

A. Yes.

Q. And have you ever worked as a police officer with [379] Benny Lee?

A. Yes.

Q. And what was Benny Lee with respect to your job?

A. An informer.

Q. And had you utilized Benny Lee's service prior in other cases, before July 4th, 1970?

Mr. Adler: I object to that.

The Court: Objection overruled.

A. Yes.

Q. And Detective Cullen, in the early part of July, 1970, if you know, where was Benny Lee residing?

A. In the Bronx House of Detention.

Q. And Detective Cullen, did you go over to see Benny Lee in the early part of July of 1970 at the Bronx House of Detention?

A. Yes.

Q. And without going into the contents of any conversation, did you make certain requests of Benny Lee at that time?

A. Yes.

Q. And Detective Cullen, did there come a time when you then visited Benny Lee again and I'm referring to July 24th, I think, of 1970.

A. Yes.

Selected Trial Testimony of Detective Walter Cullen

[379] Q. And again without going into the contents of any conversation on that particular date, did Benny Lee impart certain information to you?

A. Yes.

Mr. Cantor: Can I have it marked for identification, Judge?

The Court: Yes. For Identification.

[People's Exhibit 10 for Identification marked]

[380] Q. Detective Cullen, take a look and examine People's 10 for identification. Detective Cullen, is People's 10 for identification, a piece of paper that was given to you?

A. Yes.

Q. By whom?

A. Benny Lee.

Q. Was that on July 24th when you visited him for the second time?

A. Yes.

Q. And by the way, Detective Cullen, do you know where this defendant was lodged after he was arrested by you on July 8th, 1970?

A. Bronx House of Detention.

Q. And Detective Cullen, do you happen to know whether at any time during the period that this defendant was lodged at the Bronx House of Detention whether or not he shared a cell with Benny Lee?

A. Yes.

Q. Did he?

A. Yes.

Q. Detective Cullen, at any time during your investigation of this case, did you ever make any promises whatsoever to Benny Lee?

[381] A. No.

Selected Trial Testimony of Detective Walter Cullen

Q. Did any other officer in your presence ever make any promises to Benny Lee with respect to this case?

A. No.

Q. Or any case for that matter?

A. No.

Q. Did any assistant district attorney, including myself, in your presence, Detective Cullen, ever make any promises to Benny Lee?

A. No.

Q. And when you received People's Number 10 for identification, this slip of paper, given to you by Benny Lee, what did you do with it, Detective Cullen?

A. I put it in the case file.

Q. And when you came up to my office on March 20, 1972, was the piece of paper included in the case file that you brought with you?

A. Yes.

. . .

[394] Q. Now, Officer, you say you spoke to Mr. Lee, Benny Lee; is that right?

A. Yes.

Q. Now at the time you spoke to him, as I recall, you said he was in the House of Detention?

A. Yes.

Q. Was he there as a result of a crime which he was charged?

Mr. Cantor: I'm going to object, Judge.

The Court: Sustained.

Q. Well, did you know the reason for his being there?

Mr. Cantor: Objection, Your Honor.

The Court: Sustained.

Selected Trial Testimony of Detective Walter Cullen

Q. Well, did you have a conversation with him regarding what would happen if he informed on anyone [395] that was placed in the same cell with him?

A. Did I have a conversation with him?

Q. Yes.

A. Yes.

Q. Did you tell him what to do?

A. Yes.

Q. Did you make any promise to him that if he did what you told him there would be some consideration given him?

A. No.

Q. He did this voluntarily?

Mr. Cantor: Objection to the characterization.

The Court: Sustained.

Q. As a result of your conversation?

Mr. Adler: I'm sorry, I didn't get your ruling, sir.

The Court: The first part I sustained your objection.

Mr. Adler: Exception.

Q. Did you know that he was charged with a—

Mr. Cantor: Now, Judge, I'm going to object to Counsel testifying under the guise of asking a question, Judge.

The Court: Sustained.

[396] Q. Did you know the history of Benny Lee before he—

Mr. Cantor: Objection, Your Honor.

The Court: Objection sustained.

Mr. Adler: I have an exception, if Your Honor please.

The Court: You have.

Selected Trial Testimony of Detective Walter Cullen

Q. What did you tell Benny Lee?

A. What did I tell him?

Q. Yes.

A. I asked him, actually.

Q. What did you ask him?

A. This was on the 7th, I went over and visited him and I told him I was anticipating making an arrest. Brought a picture of the defendant with me, showed it to him, asked him if he knew him. He said he did. I asked him would he object if I made arrangements to have him put in the same cell with him in relation to the other two perpetrators who were not yet apprehended. I had no interest in your defendant, Counselor. Just the other two defendants.

I told him not to ask questions, just to remain in there and pay attention to what he heard and report it back to me.

[397] Q. So you say to me you had no interest in my defendant?

A. No.

Q. You intended putting Wilson in the same cell with an informer, without any interest in him?

Mr. Cantor: Objection, Your Honor.

The Court: Sustained.

Q. Well, Officer, weren't you interested in having him arrested?

A. Yes.

Q. And weren't you interested in getting information as to a confession or an admission?

A. From Lee?

Q. From anyone?

A. No, not from Lee.

Q. Well, did you know anybody else you could get it from?

Mr. Cantor: I'm going to object, Judge.

The Court: Sustained.

Selected Trial Testimony of Detective Walter Cullen

Q. And I take it, you made no promises nor any discussion as to any leniency or any consideration in return for Lee's being an informer?

Mr. Cantor: Objection, repetitious, Your Honor.

[398] The Court: Oh, what harm is it?

Mr. Adler: No further questions.

Redirect examination by Mr. Cantor:

Q. Now at the time you spoke to Benny Lee, you told defense counsel here that you asked Mr. Lee to, if he would, keep his ears open so to speak, since you were going to make arrangements if he agreed to have the defendant, upon the arrest of the defendant, placed in the same cell with Lee; is that correct?

A. Yes.

Q. And that was on July 7th that you had this initial conversation with Lee when you were expecting to make an arrest imminently of the defendant; is that correct?

A. Yes.

Q. And subsequently on July 8th, the next day, you did, in fact, make that arrest of this defendant? Is that correct?

A. Yes.

Q. And you did then make arrangements or had arrangements made to have this defendant placed in the same cell with Lee?

A. Yes.

[399] Q. Now at the time that this defendant was arrested on July 8, 1970, after you had spoken to Lee on July 7, 1970, were the other two perpetrators arrested?

A. No.

Q. And once you had arrested the defendant, Joseph Allen Wilson, or even going back further, once his name was in your possession and you went to see Benny Lee on July 7th and told Lee that an arrest was imminent of this

Selected Trial Testimony of Detective Walter Cullen

defendant, was your primary interest then focused on this defendant whose name you knew and whose arrest was imminent or upon the other two perpetrators?

Mr. Adler: I object to that as an operation of his mind.

The Court: Objection sustained.

Q. Will you tell us, sir, on July 7, 1970, when you went to see Benny Lee, were you interested in getting information concerning this defendant Wilson, whose name was known to you, or concerning the other two perpetrators?

Mr. Adler: I object to that, sir.

The Court: Objection sustained.

Q. But in any event, Detective Cullen, you did [400] have occasion to go back on July 24th to see Mr. Lee for a second time after he had been in the same cell with this defendant?

A. Yes.

Q. And on that particular occasion did Benny Lee give you information concerning the other two perpetrators?

Mr. Adler: I object to what was done.

The Court: Objection sustained.

Q. Well, taking a look at People's No. 10 for identification, Detective Cullen, will you read it to yourself.

Are those the notes that Benny Lee made of his conversations with this defendant in jail, sir?

Mr. Adler: I object to that.

The Court: Objection sustained.

Q. Does that exhibit, People's No. 10 for identification, contain information regarding the other two persons in this case?

Selected Trial Testimony of Detective Walter Cullen

Mr. Adler: I object.
The Court: Sustained.

Q. Detective Cullen, do you have occasion to remember defense counsel asking you on cross-examination what your conversation was with Mr. Lee on the first [401] you saw him in the Bronx House of Detention?

A. Yes.

Q. Let me ask you, now, sir, tell us the conversation you had with Mr. Lee on the second occasion, July 24th, when you went to see him?

Mr. Adler: I object to that, sir.
The Court: Sustained.

* * *

Trial Testimony of Benny Lee

[502] Court Officer: Witness' name is Benny Capital L-E-E.

MR. BENNY LEE, having been called as a witness by and on behalf of the People, testified as follows

Direct examination by Mr. Cantor:

Q. Now, Mr. Lee, are you currently an inmate in one of the New York State detention facilities?

A. Yes sir.

Q. And Mr. Lee, do you know a Detective Walter Cullen?

A. Yes sir.

Q. You see him here in the courtroom?

A. Yes sir; he's sitting right out there.

Q. Will you point him out again?

A. Right there in the first row.

Mr. Cantor: May the record indicate the witness has indicated Detective Cullen.

Q. Now, Mr. Lee, in July of 1970, for about how long had you known Detective Cullen?

A. For about five years prior to that.

Q. And Mr. Lee, during that period of time, during that five year period of time, had you ever supplied [503] any information to Detective Cullen?

A. Yes, sir.

Q. Mr. Lee, let me refer you to July 7, 1970, on that particular day were you in the Bronx House of Detention?

A. Yes, sir.

Q. And did you see Detective Cullen there?

A. Yes, sir.

Trial Testimony of Benny Lee

Q. Did he come to visit you?

A. Yes he came to visit me.

Q. And did he have a conversation with you?

A. Yes he did.

Q. And did he make certain requests of you?

A. Yes.

Q. Tell his Honor what Detective Cullen asked of you?

Mr. Adler: I object. What Detective Cullen asked of him. Not in the presence of the defendant.

The Court: You press your objection?

Mr. Adler: No, I'll make no objection.

The Court: All right.

Q. What did Detective Cullen ask you?

A. Detective Cullen told me there was a robbery and murder committed at the Star Garage.

[504] Mr. Adler: I'm sorry; I didn't hear.

Mr. Cantor: Go ahead, you may continue, sir.

A. Detective Cullen—

The Court: He didn't hear; excuse me just a moment, did you hear what was said?

Mr. Adler: I didn't get what he said.

The Court: Read what was said Mr. Reporter as far as you got it.

(Reporter read back last answer on page 503 as directed)

Q. Continue please.

A. And he had a suspect that he was looking for and he showed me the defendant's picture.

Q. Now, prior to that time did you know the defendant?

A. Not very well, no. But I've seen him around.

Trial Testimony of Benny Lee

Q. All right. And did he tell you the name of the defendant when he showed you the picture?

A. Yes he did.

Q. And what name was that?

A. Allen Wilson. Joseph Allen Wilson.

Q. And what did he continue to ask you, Detective Cullen?

A. Well, he said that he was expecting the arrested man at any time and if the man, when he got the man in custody he would have the man put in my cell in the House [505] of Detention. When the man got there, I was just to keep my ears open and see if I could find out who the other two men were that were with him on the—

Q. I couldn't hear the last—two other men that were—

A. With him on the job.

Q. Now, Mr. Lee, did you agree to that request?

A. Yes I agreed.

Q. Now, Mr. Lee, after Detective Cullen came to see you, you were in a cell, in the Bronx House of Detention, is that correct?

A. Yes.

Q. All right. And on what floor was that cell when Detective Cullen came to see you?

A. Oh, was in the sixth floor, six south.

Q. And when you first were put into six south on that cell, were you alone or did you have a cellmate, when you first came in there?

A. I was alone.

Q. And did there come a time when you got a cellmate?

A. Yes.

Q. And who was that.

A. Joseph Allen Wilson.

[506] Q. You see the defendant here in Court today?

A. Yes, sir.

Trial Testimony of Benny Lee

Q. Point him out?

A. Right there.

Mr. Cantor: May the record reflect the witness has indicated the defendant Joseph Allen Wilson.

Q. And for how long a period of time did you say you were in that cell in six south and alone before Wilson became your roommate, your cellmate?

A. About a week, few days.

Q. Now, Mr. Lee there came a time on July 13th, 1970, that this defendant became your cellmate is that correct?

A. Yes, sir, that's correct.

Q. Now, when you were up on six south in that cell, did that cell have a window?

A. Well, actually, the cell didn't have a window but the cells on six south are kept open all day and you could walk up to the cell block and look out the window.

Q. Well, if you looked out the window on that cell block—

A. Yes?

Q. What did it over look?

A. It overlooked the Star Garage.

[507] Q. And that's on 151st Street?

A. On 151st, yes.

Q. Now, Mr. Lee, when this defendant came up to your cell and joined you as a cellmate on July 13th, about one o'clock in the afternoon on that day, did he say something to you?

A. Yes; I was laying down in my cell and I was facing the wall so I didn't hear him come in because the doors are kept open and the first thing I remember him saying is somebody's messing with me, man; that was how he announced his presence to me and I turned around and he said somebody's messing with me because this is the place that I'm accused of robbing and he was looking out the

Trial Testimony of Benny Lee

window towards the Star Garage. So I sat up and we began talking and—

Q. What did he say?

A. Well, he went right into the conversation. He told me that a few nights earlier that he had gone over to the Star Garage, to see his brother who worked there and as he was coming up to the front of the door he met two men and the, one of the men asked him, is there a soda machine inside, and he said yes, and he directed the men to the soda machine. He walked inside and talked to some people and he got thirsty and he went to the soda machine [508] and as he was drinking his soda he heard two shots and he saw the two men run out of the office, stuffing money in their clothes and in their pockets and dropping money on the ground. They ran out on to the street, so he picked up a little bit of money off the ground and put it in his pocket, walked out behind the men, then he followed them up the street.

Q. Now, Mr. Lee, after the defendant told you that, what if anything did you say to him?

A. Well, I said, look, you better come up with a better story than that because that one doesn't sound too cool to me, that's what I said.

Q. And what did he reply?

A. Well, he didn't say anything, he just kept looking out the window and he never changed any of his story, not that day.

Q. Now, how long all together would you say approximately you were in the same cell with this defendant?

A. Oh, approximately 10 days, 9 or ten days.

Q. All right. After that first day when he told you that first story, Mr. Lee, on the second and on the third and fourth day, did this defendant have occasion to tell you other things?

Trial Testimony of Benny Lee

Mr. Adler: I object to the word "story". He
[509] said when he told you the first story.

The Court: Rephrase it.

Q. All right; after his first statement to you on that first day Mr. Lee, on the second and third and fourth day, during the course of those next three days, did he have occasion to make another statement to you?

A. Yes.

Q. Now, this other statement, Mr. Lee, did it come all at once or come in bits and pieces?

A. No, gradually, he changed the words in bits and pieces.

Q. And by the fourth day, that you were in the cell, on the sixth floor with this defendant did you get a new statement from him?

A. Yes.

Q. And by the fourth day, you were in this cell, tell his Honor and tell the members of the jury by that time what this defendant Joseph Allen Wilson had told you?

A. Well, we talked for several nights and talked about different people in the street, and gradually he told—he changed his story a little bit; he said that he knew that there was a lot of money there on that particular weekend because it's a long weekend.

The Court: Excuse me a minute; Till the plane
[510] passes.

A. Yes.

The Court: You may continue.

A. And, how he thought it would be a good time for a job over this—its the 4th of July weekend, because it was a long weekend and there would be a little bit more cash there and he said he was planning it for a long time and

Trial Testimony of Benny Lee

he and two other men, he mentioned several names but he never identified the men that were with him that night by name. He never said who it was. So he said he walked in first and he cased the place, so that everything was all right, went back outside, got his two partners, they came back in, went to the office, shot Sam, the man—that was the man's name, got the money, they were dropping money in their pockets and stuff and ran out of the place, run to this park about a block from the place, stopped to—that was the rendezvous, to get the money straight and see what they were going to do and finally they walked through the park to Grand Concourse and got a cab to—I think it was 156th Street and Tinton Avenue.

Q. And did he tell you Mr. Lee, did this defendant ever tell you which one of the three men, whether it was himself or one of the other two men that shot Sam, did he ever tell you specifically which one?

[511] A. No, sir he did not.

Q. And Mr. Lee did this defendant ever tell you what he had heard after this murder and after this robbery?

A. Well, he said—he had heard that the police had cordoned off the block where he lived at, and came to his house with bullet proof vests on and broken down his door with shotguns and they were looking for him to kill him, they probably would kill him on sight.

Q. Is this what he told you?

A. Yes.

Q. And did he tell you where he was during that period of time when the police were looking for him?

A. Well he never said where he was but he said he was right under their noses all the time, but they never found him.

Q. And did the defednant ever tell you the circumstances why or under which he came to turn himself in to the police station?

Trial Testimony of Benny Lee

A. Yes, he said the money was running out, and he was very scared; he was scared that the police wouldn't give him a chance if he ever was walking around and happened to run on him they would just shoot him down and he was very scared and he figured the best thing to do would be to turn himself in.

[512] Q. Now, did [illegible] a time Mr. Lee on July 24 1970 that Detective Cullen again came to visit you at the Bronx House of Detention?

A. Yes.

Q. And was that after the defendant had made those statements to you that you just told us?

A. Yes.

Q. And when Detective Cullen came to see you Mr. Lee, did you tell Detective Cullen what you've told his Honor and the jury here today in so far what this defendant told you when you were in the same cell with him?

A. Yes.

Q. Now, during the period of time, the second and the third, and fourth day when this defendant was giving you this new statement, did you during that particular time have occasion to make any notes as to what this defendant was saying?

A. Yes I did.

Q. Would you be so kind as to take a look at People's number 10 for identification Mr. Lee? And read it. To yourself.

The Court: To yourself.

A. Yes. This is the same. I mean this is the notations I made.

[513] Q. And when Detective Cullen came to see you that second time, and after you told Cullen what this defendant had told you, did you also give Cullen that particular piece of paper?

Trial Testimony of Benny Lee

A. Yes I did.

Mr. Cantor: If your Honor please, I offer it in evidence.

Mr. Adler: No objection.

The Court: I didn't hear you.

Mr. Adler: No objection.

(Marked People's Exhibit 10 in Evidence, sheet of paper)

Court Officer: People's 10 previously marked for identification, now People's 10 is evidence.

Mr. Cantor: That's only one side, Judge; the side that's stamped. The other side has nothing to do with this matter.

The Court: All right, bear with me.

Mr. Cantor: Surely.

[514] Q. Now, Mr. Lee—

The Court: Just the front side.

Mr. Cantor: Just the front side.

The Court: All right.

Q. Mr. Lee, People's Number 10 in evidence, is this a word for word account of what the defendant told you or was it merely your notations?

A. Just merely my notations.

Q. Now, Mr. Lee, what was your purpose in making notations at that particular time, during this period when the defendant was making these statements to you?

A. Well—

Mr. Adler: Just a moment, I want to think about whether I want to let this in or not, Judge. Will you give me a half a minute, please?

The Court: Yes.

Trial Testimony of Benny Lee

Mr. Adler: No objection.

The Court: You may answer that.

A. When I made these notations I was just making note of what he dwelled on the most, things that seemed to be on his mind most.

Mr. Adler: I object to that as not responsive.

Mr. Cantor: It is indeed, you Honor. I [515] asked him his purpose, his own subjective purpose.

The Court: Objective overruled.

Mr. Adler: Very well.

Q. Did you make notations specifically of all the names of individuals that this defendant gave you?

A. Yes; I did.

Q. And did Detective Cullen ask you to especially keep your mind open to any names that this defendant might mention?

A. Yes.

Mr. Cantor: And if your Honor please, since this document is in evidence, may I read it—

The Court: Yes.

Mr. Cantor: To the jury?

The Court: Yes.

Mr. Cantor: "We were hiding right under their nose" meaning 42 area, 42nd area "Junior Butts, Rooney; these two are high reg. crime—Brother Homes (ph). He mentioned them only by first names, but then lies about them. These names seem to stick in his craw—Jimmy Briggs, Banjo. "All my family asked why did I kill Sam; he was such a nice man." This worries him a lot.

Clare or girl friend who lived with his mother "My [516] old lady won't tell them anything, what she knows—police. Quote enquote. "We went

Trial Testimony of Benny Lee

through park, took cab. Tinton and 156 and walked the rest of the way.

"Worries about statements made at police station. Swears to kill uncle if ever free because uncle is telling family he killed the boss." Close quote.

The Court: What's the number of that exhibit?

Mr. Cantor: Ten, your Honor.

The Court: Then?

Mr. Cantor: Yes.

Q. Now, as you said, Mr. Lee, you did not put down everything on this one small piece of paper that the defendant told you during the course of the second, third, and fourth day; is that correct?

A. That's correct.

Q. Now, Mr. Lee, when Detective Cullen visited you for the second time on July 24th and you told him what this defendant had related to you; and when you gave him your own notations of any notes or key points that you made on this piece of paper, did Detective Cullen ask you if you would be willing to repeat that in court when the case came to trial?

A. I don't recall. I don't remember that.

[517] Q. All right, did there come a time, Mr. Lee, this past month in March of 1972 that you were brought down from upstate?

A. Oh yes.

Q. And who brought you down, sir?

A. You did, Mr. Cantor.

Q. Now, Mr. Lee, when I brought you down from upstate, and that was about how many weeks ago approximately?

A. Three weeks.

Q. Mr. Lee, did I ask you if you would be willing to repeat what you told Detective Cullen, and what this defendant told you in open court?

Trial Testimony of Benny Lee

A. Yes, sir.

Q. And what was your response to that?

A. Yes; yes.

Q. Now, at any time, Mr. Lee, with respect to this case, and this case only, did Detective Cullen ever make any promises to you?

A. No, sir.

Q. Did any other police officers with respect to this case ever make any promises to you?

A. No, sir.

Q. And, Mr. Lee, when I called you down from [518] upstate, and I asked you if you would be willing to repeat in court what this defendant told you, did I make any promises to you?

A. No, sir.

Q. Now, Mr. Lee, you've testified that you told me that you would be willing to repeat in open court what this defendant told you; is that correct?

A. Yes, sir.

Q. And what was your reason for that?

A. Well, I've been upstate and I wanted to rehabilitate myself. I'm trying to rehabilitate myself.

Mr. Adler: I object to this. I object to all of this, your Honor.

The Court: Objection overruled.

Mr. Adler: Exception.

Q. You may continue.

Mr. Cantor: May counsel be seated while the witness is testifying?

Mr. Adler: I wish he would speak a little louder.

The Court: He has a right to stand up if he's making an objection. Go ahead.

A. I just figured by telling the truth, I might help to rehabilitate myself.

Trial Testimony of Benny Lee

[519] Q. Now, Mr. Lee, you've been convicted of crimes in the past, have you not?

A. Yes, sir.

Q. And you spent some portion of your life behind bars in jail?

A. Yes, sir.

Q. And Mr. Lee, when I called you down from upstate and I asked you, Benny Lee, if you would be willing in open court to tell me, to tell the Judge, and to tell the jury everything that this defendant told you inside the Bronx House of Detention, and when you told me you would, was that because you wanted to tell the truth to help me, to help to rehabilitate yourself?

A. Yes.

Q. Is it your intent, Mr. Lee, when you get finished with whatever time you're doing, to try to go straight?

A. Yes, sir.

Q. Now, Mr. Lee, from July 24th, 1970, the last time you saw Detective Cullen until you came down from upstate, in my office, about three weeks ago, that's a period of approximately 20 months; is that correct?

A. Yes.

Q. During that period of time, Mr. Lee, did you [520] talk to anyone, any inmates in any institution that you were, or anyone concerning this case?

A. No, sir; I didn't.

Q. After speaking to Detective Cullen,—was the first person you spoke to concerning this case myself, when I called you down from upstate and had you brought here?

A. Yes, sir. Oh, there's one other thing I would like to say.

Mr. Adler: I object, if your Honor please.

Q. Is that in response to my last question?

A. Yes.

Trial Testimony of Benny Lee

Mr. Cantor: The witness indicates he would like to say something in response to my last question.

The Court: All right, you may.

Q. It was wrong. I wasn't upstate for 20 months. I got out on bail in 1970 and I was upstate since last May. I was sentenced upstate.

Q. But when I brought you down—

A. Oh yes.

Q. —pursuant to Court Order—

A. Yes.

Q. —to my office, you were doing time upstate?

[521] A. Yes, yes.

Mr. Cantor: I have no further questions on direct.

Mr. Adler: May we approach the bench, Judge?

The Court: Yes.

(Whereupon Assistant District Attorney Cantor and Counsellor Adler approach the bench and confer with the Court off the record and out of the hearing of the defendant and the jury.)

Cross Examination by Mr. Adler:

Q. Just by way of incidents, when you were first arrested, the time you were put in that cell and you were in that cell in July 1970, had your bail been fixed at that time?

A. Yes.

Q. And what was the amount of that bail?

A. \$10,000.

Q. And was there any time thereafter—was the bail reduced?

A. No, sir.

Q. You raised the \$10,000?

A. Yes, sir.

Trial Testimony of Benny Lee

Q. Now, what were you charged with?

[522] Mr. Cantor: I'm going to object.

Q. —at that time?

Mr. Cantor: I'm going to object to charges.

The Court: Yes.

Mr. Adler: I would like to show you his interest, your Honor.

The Court: No, but—objection sustained.

Mr. Adler: Well—

Mr. Adler: Let me put it this way.

Q. Did you plead guilty in that, against the charge that was made for the time you were in the jail in July, 1970?

A. Yes; yes.

Q. And was it to a reduced crime?

A. Yes.

Q. Not from that charge in the indictment?

A. Yes, sir.

Q. And how much of a reduction was it?

A. I don't know.

Q. Well, what were you charged with?

Mr. Cantor: I'm going to object Judge.

Mr. Adler: I'll withdraw it.

The Court: What was the crime that you were charged with; do you know?

[523] The Witness: Robbery.

The Court: Robbery?

The Witness: Yes.

The Court: In the first degree?

The Witness: Yes, sir.

The Court: All right, and what did you plead to?

The Witness: Robbery in the third degree.

The Court: All right, there's your answer.

Trial Testimony of Benny Lee

Q. Prior to that, had you been charged—had you been convicted of any crime?

A. Yes, sir.

Q. What crime were you convicted of the first time in your life?

A. Unlawful entry.

The Court: Just a moment please—Madam Reporter—

(Answer repeated by the Court Reporter.)

Q. Did you go to jail for that?

A. No, sir.

Q. Were you thereafter convicted of another crime?

A. Yes, sir.

Q. And what was that?

[524] A. Another unlawful entry.

Q. And did you go to jail for that?

Mr. Cantor: Judge, I'll object. The fact that he went to jail doesn't—

The Court: It is not material whether he went to jail or not.

Mr. Cantor: Objection.

Mr. Adler: I want to know when he first decided to rehabilitate himself.

The Court: That's all right. Let's find out whether—what he was convicted of. Whether he went to jail or not is something else again.

Q. Did you have another crime after that charged against you? Withdrawn. Were you convicted of another crime after that?

A. Well, that's all I remember right now.

Q. Well, do you remember what crime you were convicted of prior to robbery in the first degree?

A. Unlawful entry.

Trial Testimony of Benny Lee

Q. And the robbery charge, was this a third—as a third offender, was it?

A. As a third offender?

Q. Yes.

Mr. Cantor: I'm going to object, your Honor.

[525] third offender treatment refers to felonies. This man has admitted to being convicted for a misdemeanor—unlawful entry.

Mr. Adler. Withdrawn.

Q. Were your convictions—did they constitute any felonies prior to the robbery?

A. Yes; I did. I have a robbery. I have another robbery. I did five years for that.

Q. Do you know how many years a first degree robbery charge would bring?

Mr. Cantor: Oh, objection, Judge.

The Court: Sustained.

Q. Second offender?

Mr. Cantor: Objection.

Q. When did you first decide to rehabilitate yourself?

A. When I was out on the street on bail, just before I got sentenced.

Q. And—

The Court: What is the year, please?

The Witness: 1971, April of 1971.

Q. Well you had—you've made some notes in 1970; did you not, in July?

A. Yes.

Trial Testimony of Benny Lee

[526] Q. And were you going to rehabilitate yourself then when you made those notes that you have here in evidence?

A. Was I going to rehabilitate myself?

Q. Did you intend to rehabilitate yourself, yes.

A. No, not by making notes; no, sir.

Q. In July of 1970, did you intend to rehabilitate yourself?

A. Yes, yes.

Q. Well when in 1970 did you intend to rehabilitate yourself?

Mr. Cantor: Are we referring to July or the entire year?

The Court: July 1970. The question is plain. Overruled.

A. When did I decide to rehabilitate myself? In July of 1970, just prior to making the notes.

Q. Was it after Detective Cullen spoke to you?

A. No, I decided before that.

Q. Well, did you approach Detective Cullen and tell him that you wanted to rehabilitate yourself?

A. I was in jail. I couldn't approach anybody.

Q. Did you send a message?

A. No, sir.

[527] Q. Well, had you had any previous—I don't want to use the word dealings—did you ever have Detective Cullen ask you to do something for him?

A. No, sir.

Q. And was that before you were convicted of your second offense?

Mr. Cantor: Second offense?

Trial Testimony of Benny Lee

Q. Second offense that you were convicted of, was that before that or after?

A. (No response)

Q. Withdrawn. Was it prior to the time that Detective Cullen saw you in July of 1970?

A. Yes, yes.

Q. How long before?

A. Oh, about since 1965.

Q. And was that—did he make an arrest of you?

Mr. Cantor: I'm going to object to "arrest", any reference to an arrest. It is only convictions.

The Court: Objection overruled.

A. Yes; yes.

Q. Well, did you squeal on anyone else?

Mr. Cantor: Judge, I'm going to object.

The Court: Objection sustained.

[528] Q. Did you give any evidence against any other defendant?

A. Yes.

Q. Other than Mr. Wilson?

A. I have.

Q. How many times?

A. Oh, I have no idea.

Q. Well, would you say 20 times?

A. A lot more. No.

Q. Would you say ten times?

A. Oh, I would say it would be close to 105 times.

Q. Did you get paid for that?

A. No, sir.

Q. Did you ever get paid for that?

A. No, sir.

Trial Testimony of Benny Lee

Q. Are you aware of the fact, Mr. Cantor called you a "paid informer"?

Mr. Cantor: Judge, I'm going to object.

The Court: Objection sustained.

Mr. Adler: Exception.

Q. When is the last time you read the notes on this document that you wrote?

The Court: Referring to Exhibit what, 10?

Mr. Adler: Exhibit 10.

[529] The Court: In evidence.

Mr. Adler: People's 10. Exhibit 10.

A. Oh. right here today.

Q. First time?

A. The last time.

Q. When before that?

A. At the hearing that we had.

Q. How long ago?

A. Last week.

Q. And prior to last week, when did you read it?

A. Oh, the last time I saw that was when I handed it over to Detective Cullen.

Q. Now, where did you make these notes?

A. In Bronx House of Detention.

Q. In the same cell as the defendant?

A. Yes.

Q. In his presence?

A. Well, I don't recall if he was there or not, but he were around.

[530] Mr. Adler: May I have that last question and answer read to me.

The Court: You want the previous reporter brought back?

Mr. Adler: If we will agree with what was said, that would satisfy me. I don't want to take up the time of the Court. My recollection is, the question

Trial Testimony of Benny Lee

and answer, that he don't remember the defendant being in the cell when he made these notes.

Mr. Cantor: I wouldn't subscribe to that. The question was, was the defendant present when these notes was made and the answer was he was there, quote, unquote. He was there.

The Court: Do you agree to that?

Mr. Adler: No, I don't recollect it that way.

The Court: All right, bring madam Reporter back.

(Whereupon, previous Reporter came back and read back last three questions and answers.)

The Court: Thank you, madam Reporter.

Reporter: You're welcome.

Q. Do you remember my asking you—Refer to Page 68 of the minutes—excuse me, Page 69, on the [531] bottom of Page 68—Do you remember being asked this question?

"Question: Where was the defendant when you wrote these?"

Referring to the notes. And the answer:

"Answer: He was there.

"Question: Who wrote them? He saw you write those?

"Answer: Yes, of course.

"Question: How far away was he when you wrote this?

"Answer: In jail, people mind their business. They keep their eyes—"

And I interrupt with a question:

"Question: I didn't ask you that. How far was he away?

Trial Testimony of Benny Lee

And your answer:

"Answer: Maybe three feet.

"Question: Did you tell him you were making any notes about him?

"Answer: No."

Do you remember being asked those questions and making those answers?

A. Yes, sir.

[532] Q. Now, would you say he was within three feet of you when you wrote some of these notes at this time?

A. Yes, I still say that.

Q. Now, did he ever ask you what you were writing?

A. In jail, people mind their business.

The Court: No. Did he ever ask you?

The witness: No, sir.

The Court: All right.

Q. Well, did he confide to you anything other than the facts of this incident which happened on July 4, 1970?

Mr. Cantor: Judge, I'm going to object to that.

The Court: Sustained.

Q. Did he tell you any other things about his life?

Mr. Cantor: Judge, I—

A. I don't recall.

Mr. Cantor: In the interests of securing a fair trial here, I must object. I think counsel should reconsider that question because there are matters here that don't pertain to this case that if it came out might be severely prejudicial to his client, and I'm objecting in light of that.

Trial Testimony of Benny Lee

[533] The Court: Mr. District Attorney, I think the defendant indicated no.

Mr. Cantor: The witness, Judge.

The Court: The witness. The witness indicated no. Is that what your answer was?

The Witness: Yes.

The Court: All right.

Q. So that—

The Court: So we're talking about a lot of things that's not necessary.

Q. Now, how long after he made these statements to you did you write down these notes?

A. Well, I wrote them down as he made them, as we went along. I didn't have any particular time.

Q. Did you write them—

Mr. Cantor: I don't think the witness completed his answer before counsel interrupted.

The Court: Have you completed your answer?

The Witness: Well, you know, just over a period of days I would make the notations and then I would, as he went, as we went along, of things that I thought would be of help to Det. Cullen.

Q. You wrote the things you thought would be of help to Det. Cullen?

[534] Yes.

Q. Now, when he finished telling you a statement, as you relate, how long after he finished telling you that did you put it on your paper?

A. I don't remember how long afterwards. But he was making statements and maybe the next day he would write it, and if it seemed to be in his mind a lot, well, that's what I put on the piece of paper.

Trial Testimony of Benny Lee

Q. Well, would you put it down after he related it the second time?

A. I didn't—

Mr. Cantor: Judge, I'm going to object. The witness testified there was no pattern.

The Court: Objection overruled.

A. No, I would think—I just put it down as he went along. I don't remember the pattern which I did it, if I even had a pattern. I just figured that things would, may not mean—maybe these statements didn't mean much to me, but they would mean something to Det. Cullen because I wanted to help him with the case.

Q. You had no idea what would help Det. Cullen?

Mr. Cantor: Objection.

A. I had—

Mr. Cantor: I'll withdraw it.

[535] The Court: You may answer.

A. I know what would help Det. Cullen, but I figured these things would also help him. I knew what I wanted, what I was doing.

Q. I want you to follow with me, if you will. When he would finish you a story or a statement, as you call it, would you sit down, right then and there, and write down something on a paper?

A. No, sir, no. Not right then and there.

Q. Well, how long after?

A. Well, as I say, we were piecing together a story. Gradually he would tell me more and more. Sometimes he would make the same statements word for word. So that's why I put them down. Because I figured maybe they would be of help to Det. Cullen.

Trial Testimony of Benny Lee

Q. So then you pieced it together; is that it?

A. No, I—

Mr. Cantor: Object to the characterization.

The Court: Objection sustained.

Q. Did you write this paper all at one time?

A. No, sir.

Q. You wrote it at different times?

A. Yes.

Q. And did you hand it to Det. Cullen when the [536] paper was completely written?

Mr. Cantor: The paper—

Mr. Adler: Wait a minute, now.

The Court: What do you mean by completely written?

Mr. Adler: Well, when this full page was written.

The Court: We're only referring to one side.

Mr. Adler: That's right.

Mr. Cantor: Not that side.

Q. I'm referring to this side. Did you give this to Det. Cullen when it was completely written on, that entire page, as far as the lettering goes?

Mr. Cantor: Well, Judge, I object. The lettering does not go down to the very bottom of the page.

Mr. Adler: I said as far as it goes, counsel.

Mr. Cantor: I object to the form of the question, Judge.

Mr. Adler: I'll withdraw the question.

Q. How many times did you offer this paper to Det. Cullen?

A. Just once. I gave it to him once, that's all.

Trial Testimony of Benny Lee

Q. Well, did you ever write on this paper and [537] stop before the last word was written on it?

A. Yes.

Q. And what did you do with it? Where did you stop the first time?

The Court: Show it to him.

A. We were hiding right under their noses. I stopped then.

Q. May I see that, please.

A. Yes. Right on top.

Q. What did you do with the paper when you stopped writing with it? Where did you put it?

A. In my pocket.

Q. In the same cell that he was stationed with you?

A. Yes.

Q. And then when was the next time that you wrote on it? When did you stop?

A. Well, it might have been that same night. I don't—I really don't remember. This was over a period of ten days. I don't remember when I—I couldn't—

Q. Well, how many times did you write on it and stop?

A. I have no idea. I mean I don't know how many times I wrote on it then stopped.

[537A] Q. Well, when he again made a full statement, would you write all of the full statement down that he gave you or did you just put a little piece of it?

A. No, I would put the whole statement.

Q. Well, now—

A. All of it, yes, the whole statement.

Q. Well, may I have that, please. Is it your testimony then that the first time you discussed with him, you said he said to you we were hiding right under their noses. Is that all he told you?

A. No, that was the first statement that I considered important enough to put down.

Trial Testimony of Benny Lee

Q. He didn't tell you anything else?

Mr. Adler: Withdrawn.

Q. What, if anything, else did he tell you?

Mr. Cantor: At what point, Judge?

Q. At the point that we were hiding under their noses.

A. You mean what did he say after that?

Mr. Adler: No. Withdrawn.

Q. You testified that you stated—You stated rather, that you wrote the first time your notations were we were hiding right under their noses, and you stopped.

[538] A. Yes.

Mr. Cantor: He testified that was the first thing of import that he put on the paper in his judgment, Judge. I object—

The Court: No, Mr. Cantor. We don't want your interpretation. The jury will disregard Mr. Cantor's remarks. Go ahead.

Q. Did he tell you anything other than we were hiding under their noses at that time?

A. That was just a piece of the story that he would come back to, and he seemed to come back to it like it was something important in it. So I thought maybe there might be.

Q. Well, now, you write in here: Junior, Butts, Ronnie, quotes. These two are his, quotes, R-e-g crime, and brother, quotes, homes. He mentioned them only by first names. Did you write that?

A. Yes.

Q. And then you say: but then lies about them. Their names seem to stick in his craw. Is that what you said?

A. Yes.

Trial Testimony of Benny Lee

Q. Did you question him as to whether he was lying or not?

[539] A. No, sir.

Q. That was your own opinion that he was lying when you wrote this?

A. No. It was my opinion that the names stuck in his craw.

Q. And when you wrote that he was lying, that was—was that a result of your questioning him?

Mr. Cantor: Objection, Judge.

The Court: Objection overruled.

A. No, sir.

Q. It was just an opinion that you felt about it?

A. Yes, sir.

Q. Now, on these 150 times that you had been an informer or approximately 150 times, were you ever paid?

A. Was I ever paid?

Q. Yes. Were you?

A. Well, it all depends on what you mean by paid.

Q. Well, what do you mean by paid?

A. Well, I don't know.

Q. You don't know what payment means?

Mr. Cantor: I'm going to object to—

The Court: Objection sustained. Don't argue with the witness.

Mr. Adler: I'm sorry Judge. I didn't mean [540] to interrupt you.

The Court: Did you receive money for it or did you receive some other consideration? Do you know what a consideration is?

The Witness: Oh, yes. I received other considerations.

The Court: All right. Tell counsel.

Trial Testimony of Benny Lee

Q. And did you receive a consideration on each time that you informed?

A. Yes.

Q. But this time, July 4? All but the July 4, 1970. You received nothing?

A. Yes, sir—No, sir, I didn't receive anything.

Q. You don't take drugs?

A. Yes, sir.

Q. Were you ever offered any drugs in consideration of your giving testimony?

A. No, sir.

Mr. Adler: No further questions.

Redirect examination by Mr. Cantor:

Q. Now, when you came down to my office, Mr. Lee, and I asked you if you would be willing to repeat what this defendant told you in open court, you testified [541] that I made no promises to you; is that correct?

A. Yes, sir.

Q. But exploring your intent, as counsel did, your state of mind, when you came down and you agreed to testify in open court, did you in your own mind have certain expectations?

Mr. Adler: You Honor, please—All right, I'll withdraw my objection.

A. Yes. I thought that my coming here today and telling the truth, that I could only help myself.

Q. And did you have expectations and hopes although no promises have been made to you, Mr. Lee, that if you testified and told the truth in this court as to what this defendant told you that the authorities would take note of that?

A. Yes, sir.

Trial Testimony of Benny Lee

Q. Now, Mr. Lee, do you take shorthand?

A. No, sir.

Q. So this piece of paper, People's Number 10 in Evidence, Mr. Lee, this does not reflect word for word everything that this defendant told you over the period of ten days that you and him were in the same cell; is that correct?

A. That's correct.

[542] Q. Mr. Lee, the notations that are on this particular piece of paper, were these notations that you—made for a reminder for yourself so that when you spoke to Det. Cullen, this will alert you to certain things that you wanted to tell Det. Cullen as to what this defendant told you?

A. Yes, sir.

Q. Now, at all times that you were in this cell, with this defendant, Mr. Lee, for the period of ten days you testified that you would make some notations and then stop, and put the piece of paper in your pocket?

A. Yes, sir.

Q. At all times until you gave this piece of paper, People's Number 10, over to Det. Cullen, was this piece of paper on your person in your pocket?

A. Oh, yes, sir.

Q. Did you ever let it out of your possession?

A. No, sir.

Q. And for the most part, Mr. Lee, when you were in that same cell listening to everything that this defendant told you, were you for the most part listening to names that he would give you with respect to the other two people that pulled the job with him?

Mr. Adler: I object to that.

[543] The Court: Sustained.

Q. Now, you testified that you were in the same cell for approximately ten days with this defendant, is that correct?

A. Yes.

Trial Testimony of Benny Lee

Q. And that by the end of the fourth day he had given you a new statement, completely new?

A. Yes.

Q. And between the fourth and tenth day, on the fifth, sixth, seventh, eighth, ninth, and tenth day, did he repeat some of the things that he told you on the second, third, or fourth day, that made up the new statements?

A. Yes.

Q. No, Mr. Lee, at times—

Mr. Cantor: Withdrawn.

Q. On the sixth floor at that particular time, during the daytime hours, did they keep the cell doors open?

A. Yes.

Q. And did the inmates have access to that floor, to that tier?

A. Yes.

Q. And were there times, Mr. Lee, by the way, were [544] you on the lower or upper bunk?

A. I was on the lower.

Q. And the defendant was on the upper bunk?

A. Yes.

Q. So that you could see if he peered his head down and looked at you, you could see him?

A. Yes, sir.

Q. And, Mr. Lee, at times when you made certain notations on People's Number 10 for Evidence, was the defendant either in the cell or up and down the tier on 6M?

A. Yes, he was—When I say three feet, I mean he was three feet away, but he could have been watching television or talking to someone.

(Continued on next page.)

[545] Q. Is there a television right there on six M, on that floor, on the sixth floor rather?

A. Yes, sir.

Trial Testimony of Benny Lee

Q. And all of the inmates who have their cells on that floor there, their cells remain open during the daytime hours?

A. Yes.

Q. So they can congregate and talk amongst themselves?

A. Yes.

Q. And at times that you made these notations, the defendant would be somewhere from your presence, watching television or talking with inmates?

A. Yes, sir.

Mr. Adler: I object.

The Court: Sustained. Let the witness testify.

Q. All right. You tell us during certain times that you made notations on those, on this piece of paper, People's number 10 what the defendant was doing.

A. Well, one time he's watching television, another time he was writing a letter and another time he might have been talking to the other man.

Q. And were there times Mr. Lee when you made notations on People's 10 that the defendant was no where in the [546] vicinity.

A. Yes, sir.

Q. And for approximately when you made these notations on Peoples number 10, how long would you say on the average making these notations before you put it back in your pocket.

A. Maybe 20 seconds, or so.

Q. And then you put it back in your pockets?

A. Yes.

Q. Now you testified Mr. Lee, that you gave information to Detective Cullen approximately 150 times is that correct?

A. To the police 150 times.

Trial Testimony of Benny Lee

Q. To the police?

A. Yeah.

Q. But is this the first time Mr. Lee that you're testifying in open court?

A. Yes sir.

Q. On all of those other occasions when you gave information to the police were you what is known as an undercover informant?

A. Yes, sir.

Q. Now, Mr. Lee, when you were serving the police as a confidential informer of course your identity was never [547] disclosed is that correct?

A. Yes that's correct.

Q. And is it not a fact that the reason your identity was never disclosed is because once it was disclosed your usefulness to the police would be at an end?

A. Yes, sir.

Mr. Adler: If your Honor please, I object to this.

Mr. Cantor: Well, Judge—

Mr. Adler: All right.

Q. And of course Mr. Lee, by your testifying here in open court today, in front of the whole world, so to speak, you of course realize your usefulness to the police is at an end is that correct?

Mr. Adler: I object to that. That's a conclusion.

The Court: Yes. Sustained. That's a matter of opinion.

Q. All right. Mr. Lee, you remember the defendant's attorney asking you a lot of questions about the number of times that you gave information to the police is that correct?

A. Yes.

Trial Testimony of Benny Lee

Q. And on the many times you gave information to [548] the police did that information lead to arrests and convictions?

Mr. Adler: Oh, I object to that, sir.
The Court: Sustained.

Q. Well Mr. Lee is it not a fact that the information you gave to the police was reliable since the police came back to you for further information?

Mr. Adler: I object to that.
The Court: Objection sustained.

Q. But in any event Mr. Lee the police had enough confidence and reliability on you to use you approximately 150 times is that correct?

Mr. Adler: I object to that.
The Court: Sustained.

Q. And is it not a fact Mr. Lee that on several occasions during the time that you supplied information to Detective Cullen, Detective Cullen would give you a few dollars for coffee or things like that?

A. Yes.

Mr. Adler: I object to few dollars for coffee.

Mr. Cantor: O, Judge, counsel went into—

Mr. Adler: Let him talk about a few dollars but it may not be coffee.

Mr. Cantor: I withdraw that characterization.

[549] Mr. Adler: Let's find out how much then.

Mr. Cantor: Judge, you run this court.

The Court: Counsel, step up a minute.

Mr. Adler: Please forgive me, I didn't mean to intrude on your Honor's province.

Trial Testimony of Benny Lee

(Off the record discussion at the Bench between the Court, Ass't DA. Cantor and Mr. Adler out of the hearing of the jury and the defendant)

Q. And did Walter Cullen, Detective Cullen, on several occasions give you money for cigarettes or incidentals, carrying around pocket money, so to speak?

A. Yes. Cigarettes, yes; and telephone.

Mr. Adler: May I have that last word, please.
The Witness: Telephone call.

Q. And Mr. Lee, you remember counsel asking you whether you raised that ten thousand dollars bail, you said you did?

A. Yes.

Q. Your family raised it, did they not?

A. My family, yes—

Q. Did your family, do they work sir for a living?

A. Yes.

Q. And who is that sir?

A. My father, he raised the money.

[550] Q. He raised it. And what does he do for a living, sir?

A. He's a cabdriver.

Q. And your father put up that ten thousand dollars bail that enabled you to come out of the Bronx House of Detention?

A. Yes, sir.

Q. And when you sir compromised that outstanding robbery case, Mr. Lee, you pled guilty did you not?

A. Yes sir.

Q. You admitted to a judge in open court what you had done, is that correct?

A. Yes sir.

Trial Testimony of Benny Lee

Q. And as a result of that admission, sir, as a result of your pleading guilty you were sentenced to prison, is that correct?

A. Yes, sir.

Q. And Mr. Lee, every single word that you have testified to in this court concerning what this defendant told you in Bronx House of Detention is it the God's honest truth?

A. Yes, sir.

Mr. Cantor: I have no further questions on re-direct, Judge.

[551] *Recross-examination by Mr. Adler:*

Q. Incidentally, what date did you take that plea of guilty to third degree of robbery?

A. It was in February of—I forgot the date.

Q. Well, you remember what year?

A. Yes; it was last year. '71.

Q. '71?

A. Yes.

Q. And that was after July 4th, 1970, of course?

A. Yes.

Q. Now, when Detective Cullen would give you some dollars for cigarettes how much would he give you?

A. Never more than a dollar.

Q. One dollar?

A. Yeah.

Q. And did you want to tell him these facts in this and in the 140 other cases or to the other detectives or the district attorney to clear your conscience?

Mr. Cantor: I object to that.

The Court: Sustained.

Trial Testimony of Benny Lee

Q. Well, did you do it because you wanted to be a good citizen?

[552] Mr. Cantor: Objection.

The Court: Sustained.

Q. Well, did you do it because you wanted to see justice done?

Mr. Cantor: Objection, Judge.

The Court: Sustained.

Q. Did you ever lie—withdrawn. Did you ever plead guilty to the unlawful entry case?

Mr. Cantor: Now, I'm going to object, your Honor.

The Court: Objection sustained.

Mr. Adler: Well, he's always telling the truth, Judge.

Mr. Cantor: Judge, I'm going to object to counsel's gratuitous comments.

The Court: Keep your voice down Mr. Cantor. I'd like to be heard.

Mr. Cantor: Very well, Judge.

The Court: It's immaterial whether he pleaded not guilty.

Mr. Cantor: I mean his own client entered a plea of not guilty in this case.

Q. Would you ever lie to save yourself from going to jail?

[553] Mr. Cantor: I object Judge.

The Court: Sustained.

Mr. Adler: No further questions.

The Court: Anything further Mr. Cantor?

Mr. Cantor: Nothing further, Judge.

The Court: You may step down, Mr. Lee. (Witness excused)

**Wilson's First Petition For a Federal
Writ of Habeas Corpus**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Petition for Writ of Habeas Corpus

U.S.A. ex rel., JOSEPH ALLAN WILSON
t/n JOE ALLAN WILSON,

Petitioner,

—v—

HON. ROBERT J. HENDERSON, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, AUBURN, NEW YORK,
Respondent.

State of New York) ss.
County of Cayuga)

I, JOSEPH ALLAN WILSON, first being duly sworn, deposes
and says that:

1—I am a citizen of the UNITED STATES and over the
age of twenty-one years.

2—I am the relator-petitioner herein and in all matters
pertaining hereto, and the person who executed the afore-
mentioned application for writ of habeas corpus.

3—Relator is not detained pursuant to a mandate, final
order, commitment or process issued by a court or judge
of the UNITED STATES.

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4—The cause of pretense of relator's detention is as
follows:

On April 20, 1972, following jury trial and conviction
of murder, and possession of a weapon, relator was sen-
tenced on May 19, 1972, to twenty years to life and con-
current zero to seven years, imprisonment by the Hon.
Edmund A. McCaffrey, Supreme Court of Bronx County.

5—This petition is based upon the contention that rela-
tor's conviction and detention contravenes the due process
and equal protection clause of the Fourteenth Amendment
to the United States Constitution in that:

“Relator was deprived of due proces of law when:

A—The denial of relator's motion to dismiss the in-
dictment for failure to prosecute was improper in
view of the U.S. Constitution and laws of the State
of New York.

B—The statements alleged to have been made by this
relator to the arresting officer was improperly ad-
mitted into evidence.

C—The statements alleged to have been made by this
relator to his cell-mate, a conceded police agent,
was improperly admitted into evidence.

D—The court erred in failing to rule on or grant de-
fendant's motion for discovery pursuant to CPL
240.20.

E—Relator has exhausted all available state remedies
and is now properly entitled to Federal review and
relief. Title 28 U.S.C., Section 2254; Fay-v-Noia,
372 U.S. 391; U.S. ex rel. Carafar-v-La Vallico,
334 F.2d. 331, inter alia:

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(a)—The Court of Appeals of the State of New York denied relator Leave to Appeal to that Court after affirmance by the Appellate Division, First Department on April 23, 1975.

Facts Briefly Stated

The people claim that the defendant went to the Star Maintenance Corporation (a taxi garage) at 121 East 151st Street, the Bronx, about 3:30 a.m. on July 4, 1970, with the intent to commit a robbery and that he, acting in concert with two others, did commit a robbery and did murder one Samuel Reiner, employed by Star as night dispatcher and night manager, who died as the result of being shot twice.

Defendant, who had been employed at Star for a few weeks about 18 months prior to July 4, 1970, and whose brother and uncle were employed by Star at the time of the crime, came into the garage alone, the People claimed, to "case" the situation and was joined there about twenty minutes later by two other men.

The defendant was placed at the garage by one employee before the commission of the crime and before and after the crime by two other employees by testimony given by three at the trial. None of the three knew the defendant prior to July 4, 1970, and all testified they had originally identified him after being shown photographs of five men by the police.

The two employee-witnesses who testified that they saw the defendant in the garage after the commission of the crime said they saw him with bills (money) cradled in his arms and that as he left the garage he said to them, "Keep cool. I've left something on the floor for you." None of the employees heard any shots fired or testified they had seen the defendant with a gun.

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The three employee-witnesses also testified they had seen the defendant in conversation with two other men in front of or in the garage just prior to the commission of the crime.

After arriving at the Star garage about 4:30 a.m. July 4, 1970, the police were given the employee file of the (illegible) around. The defendant then said good night to the mechanic and went to the dispatcher's office to say good night to Samuel Reiner. The defendant, according to the statement, heard two shots as he entered the dispatcher's office and the defendant "stopped by the cigarette machine." The defendant observed the two men he had seen earlier by the soda machine as they took money on hand in the office and then ran out of the garage. The defendant then ran out of the garage himself, being afraid that he would be blamed. He went to a donut shop and later went to the apartment of some friends where he remained for several hours. That afternoon, he left the apartment and, while talking with a friend on 158 Street saw his brother approach. His brother told him that Samuel Reiner was dead and that the police were searching for the defendant. The defendant told his brother that he did not want to discuss it and would call him later. The defendant, according to the statement, declined to tell the police what he did between July 4 and July 8, 1970, the latter date being the date when he came to the station house where he was arrested.

According to Lee's testimony at a preliminary hearing and repeated at the trial, the defendant first told him, in the absence of any questioning on the part of Lee, essentially the same story contained in the same statement to the police. Lee testified that he told the defendant "the story doesn't sound too good" and that two or three days later the defendant changed his story, said he did know

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the two men by the soda machine, had planned with them the robbery and that in the commission of the robbery "we shot the man." Lee testified that the defendant, hearing that heavily armed police were searching for him and fearing for his safety, decided "to turn himself in." Lee testified that he made notes of the various statements made by the defendant and gave these notes to the police on July 24, 1970.

Deprivations of Due Process

(1—*The court erred in refusing to grant the defendant's motion for a dismissal of indictment for failure to prosecute, thereby denying the defendant-appellant his constitutional and statutory rights to a speedy trial.*

The defendant was not brought to trial until 20 months after his indictment (21 months after his arrest) and this delay resulted in a denial of his right to a speedy trial.

The CPL requires that a defendant be given a speedy trial "after a criminal action commenced." CPL 30.20. An action commences with the filing of an accusatory instrument. CPL 1.20(17).

While the New York State Constitution does not contain an explicit guarantee of a speedy trial, the legislature created such a right. *Code Criminal Procedure* 8(1). Subsequent provisions of the code attempted to set forth principles and standards fixing the concept of a speedy trial. *Code Crim. Proc.* 667-673.

The Commission Staff Comment to CPL 30.20 (derived from *Code Crim. Proc.*, 8(1)) read in part:

The existing Criminal Code statutes in this field have proven of little utility and most of the "speedy trial"

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and "good cause" for delay problems have been resolved by the courts on a case to case basis in accordance with their reactions to the particular facts presented (citing cases). The criminal Procedure Law does not carry over any of these code provisions, nor, at this point, does it offer any new legislation on the subject. The monumental task of formulating adequate speedy trial standards, complicated in New York by the wide diversity of courts and calendar problems, is still under study by the commission. Accordingly, the instant proposal temporarily contents itself with postulating the general requirements of a speedy trial and rendering any deprivation thereof a ground for dismissal of the pending charge (170.30 (1e), 210.20 1g)).

And the right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution has been held applicable to state prosecutions. *Dickey v. Florida*, 398 U.S. 30 (1970); *Smith v. Hoony*, 303 U.S. 374 (1939); *Klopper v. North Carolina*, 300 U.S. 213 (1967).

What are the particular facts in the instant case and, in light of these facts, was the appellant denied his right to a speedy trial?

The appellant, a 25-year-old, accompanied by his brother presented himself at the station house of the 44th Detective Squad, Bronx, on July 8, 1970, and was placed under arrest for the murder on July 4, 1970, of one Samuel Reiner. An indictment charging the appellant acting in concert with two others with the murder and with possession of a weapon as a felony was returned on August 27, 1970. The appellant entered a plea of not guilty on September 24, 1970. The trial of the appellant, who was held in \$25,000 bail, was set down for trial after some 18 adjournments on March 29,

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1972, in part 16, Supreme Court, County of Bronx, before Hon. William Kapolman.

The appellant announced his readines for trial. In an effort to crystalize for this Court the facts supporting his contention that he was denied a speedy trial, the appellant sets forth the following excerpt from the proceedings that day:

* * *

Mr. Adler: If your Honor please, we are ready for trial. (The defendant is present with Counslor Adler.)

The Court: Mr. Cantor?

Mr. Cantor: Judge, I understand that your Honor is currently in the midst of a trial.

The Court: And thereafter will be assigned to another part effective at the termination of this present trial.

Mr. Cantor: All right, may we step up Judge?

The Court: Yes, you may.

(There was discussion at the bench (illegible) and Mr. Adler.)

The Court: On consent of counsel.

Mr. Adler: No, don't put on my (illegible) to make a motion to have the indictment dismissed on the grounds of lack of prosecution.

The Court: You may make your motion.

Mr. Adler: All right. If your Honor please, at this time I would like to move to dismiss the indictment on the grounds of lack of prosecution* * *.

Mr. Cantor: Judge, I am receptive to any formal application of that nature so long as it is made in the customary formal manner on papers and submitted through Part 12* * *.

However, I would at this particular point say that this case just by way of background is the oldest case that

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I have and it shall be tried in the April Term, Judge. Of course, given the understanding that I have a courtroom to go into in and a judge to try that case before. We are all aware of the problems, but this is my oldest case and this defendant shall be given a trial before any other defendant that I have in my case folder.

Mr. Adler: I must ask that the insistance on papers be waived by this Court for the reason this matter was set down for trial today, Judge.

The Court: The Court declines to wave the motion to be made on papers and directs counsel to make an application or motion before Part 12.

The case is now adjourned to April 11. The motion made by counsel for dismissal of the indictment for failure to prosecute is denied without prejudice to renewal in Part 12 on papers.

* * *

Proceedings, March 29, 1972, pp. 2-4.

The motion to dismiss for failure to prosecute was renewed (*Hearing & Trial* pp. 2-3), the court was advised by the People that some of the delay had been occasioned by the appointment of appellant's original counsel to the bench approximately 18 months after being assigned to represent counsel and that apppellant had requested some adjournments. The motion was denied. *Hearing & Trial* pp. 3-4.

Sec. CPL of the Code of Criminal Procedure provided that a person under indictment (illegible) the next term of court and failure to do so resulted in a dismissal of the indictment. *People v. Wilson*, 3 N.Y. 2d 391 (1961). (Indictment dismissed for a twenty-one month delay in bringing the case to trial.)

A defendant who is incarcerated pending trial is entitled to trial preference over all criminal actions, except

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those in which a defendant has been at liberty on bail or recognizance for 180 days or longer. CPL 30.50.

The reason for the rule requiring a speedy trial were enunciated in *People v. Prosser*, 309 N.Y. 353 at 356:

(1) The accused is protected against prolonged imprisonment if he is held in jail pending trial.

(2) The accused is relieved of the anxiety and public suspicion attendant upon an untried accusation of crime.

(3) The accused is shielded from being "exposed to the hazard of a trial after a great a lapse of time" that "the means of procuring his innocence may not be within his reach..."

In this instant case, the appellant did not agree to the delay nor did he cause it himself. The appellant should not be denied his constitutional and statutory rights because of court congestion, or the failure of the police to apprehend his alleged co-defendants, or the prosecutor's system of selecting cases to be tried or an interruption in representation by assigned counsel, where, as here, some 18 months had elapsed following indictment and replacement of counsel made necessary by events beyond the control of the appellant.

The record in the instant case is not clear as to who requested the numerous adjournments nor what part of the delay was caused by court congestion. The appellant submits that in the interest of justice and due process and to protect his constitutional and statutory rights to a speedy trial that ambiguities in the record should be resolved in his favor. "The Fourteenth Amendment's guarantees do not depend on the action or inaction of any particular state agency or individual but protects the defendant against state action of any kind which deprives him of his rights."

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Dissent: *People v. Ganci*, 27 N.Y. 2d 418 at 431, see also *People v. Purdy*, 29 N.Y. 2d 800 (1971).

Both public and private interests compel the conclusion that every individual should be afforded a speedy trial, regardless of his ultimate guilt or innocence. *People v. Prosser*, supra, at 361.

The appellant not having been brought to trial at the next term of court after his indictment his motion for dismissal of the indictment for undue delay should have been granted in the absence of a "good cause to the contrary" showing. *People v. Wallace*, 26 N.Y. 2d 371 (1970).

On the facts of the instant case, appellant urges that the delay in bringing him to trial was prima facio unreasonable. Unlike the defendant in *Ganci*, supra, the appellant herein was not in jail serving time on another charge.

The appellant respectfully calls the Court's attention to recent requirements for speedy criminal trials in Federal Courts as promulgated by the United States Court of Appeals for the Second Circuit. In the absence of delays caused by the defendant or his counsel, or delays for good cause by the Prosecution, a criminal case must be brought to trial within six months of its commencement, and absent a showing of good cause for failure to do so the indictment must be dismissed. N.Y.L.J. Jan. 7, 1971 at 4, col. 8.

(2—The Court erred in ruling that the statement made by the defendant to the arresting officer was voluntary and not coerced and that its admission was not violative of the defendant's constitutional rights.

The arresting officer testified at the *Huntley* hearing in response to the people's question, "From the beginning, tell us what you said to the defendant and what he said to you" as follows:

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He had a right to remain silent. I asked him if he understood. He said yes. I told him anything he did say could be used against him in a court of law. I asked him if he understood; he replied yes. I told him he could have an attorney; he had a right to an attorney now, at any time in the future. I asked him if he understood; he said yes. I told him if he could not afford an attorney, one would be provided for him free of charge. I asked him if he understood. He said yes. I then asked him, having understood all of this, do you wish to make a statement? And he replied no.

HEARING & TRIAL, pp. 23-24.

The arresting officer, now at this point left alone with the defendant, continued the interrogation and obtained a statement from him. The Court held the statement " * * * voluntary and in no way abridged the defendant's rights."

HEARING & TRIAL, pp. 141-142.

The statement subsequently was introduced into evidence by the People at the trial.

HEARING & TRIAL, pp. 370-378.

The defendant clearly was deprived by this ruling of his right to remain silent. The rule of *Miranda* is:

Once warnings have been given, the subsequent procedure is clear. If the defendant indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda v. Arizona*, 384 U.S. 436, 473-474.

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The record is conclusive in the instant case that the arresting officer followed a course of "continued importunity," to use the felicitous phrase from the recent Court of Appeals decision which distinguished between continued questioning of a defendant after he has invoked his constitutional privilege and "a subsequent request, upon reiteration of the requisite warnings, for a reconsideration of the decision to make no statement."

PEOPLE V. GARY, 31 N.Y. 2d 68, 70

(3—*The Court erred in ruling that statements made by the Defendant to his cell-mate, a conceded police agent, were voluntary and that the admission of said statements into evidence was not violative of the defendant's rights.*

The police on July 7, 1980, spoke with one Benny Lee, who was incarcerated at the Bronx House of Detention, and engaged his services in a clever scheme designed to extract information from the defendant, who was known to Lee. The scheme involved transferring Lee into a cell that overlooked the premises of the Star garage and then having the defendant placed in the cell with Lee. The police testified they had instructed Lee to obtain information regarding the identity of the two perpetrators who remained at large.

HEARING & TRIAL, pp. 34-36.

The psychological pressure exerted on the defendant worked, according to Lee, who testified,

He (the defendant) came in about one o'clock. It was after lunch. And he was very upset about being moved up to the sixth floor. The garage which the crime was committed faces that part of the Bronx County, and

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you can look right down into the garage * * * and he said that he had been accused of a robbery and a murder at the garage that was facing us, and he was upset about the fact that he was moved from one cell upstairs to another that faced that garage."

HEARINGS & TRIAL, pp. 56-57.

Lee testified at the trial that the defendant's initial statement to him was essentially the same as he was said to have made to the police at the time of his arrest. (Background, page 4, supra), but that the defendant changed his story a few days later and told Lee that he had planned and executed the crime in concert with two other men whom he never identified to Lee.

The people conceded that Lee was an agent of the police.

(HEARING & TRIAL, p. 65.)

A "statement" as defined by the CPL includes a confession, admission or any other statement "made by a defendant with respect to his participation or lack of participation in the offense charged" and "may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made." CPL 60.45(1).

A statement is "involuntarily made" by a defendant when it is obtained from him by "any person" by the use "or threatened use of physical force upon the defendant" "or by any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement." CPL 60.45 (2).

The defendant urges that the police methods to which he was subjected were in violation of rights guaranteed

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to him by the constitution of this state or of the United States.

The scheme failed in its stated purpose of obtaining the names or the identities of the other two men seen at the Star garage on the morning of July 4, 1970. The admission of the Lee testimony and the alleged statement made by the defendant upon his arrest at the trial was the primary evidence offered to the jury linking the defendant with the crimes of which he was charged.

(4—*The Court erred in failing to rule on or to grant defendant's motion for discovery.*

The defendant submitted a pro se motion for discovery, seeking, inter alia, statement made by the defendant. The record is not clear as to the decision of the court to which the motion was originally addressed nor does the record indicate that the court ruled on the motion when it was renewed at trial.

HEARINGS & TRIAL, pp. 4-9.

The statutory language regarding "a written or recorded statement made by the defendant to a public servant engaged in the law enforcement activities or to a person then acting under his direction or in cooperation with him" is mandatory. Discovery must be ordered when such statement "is within the possession, custody or control of the district attorney, and is known by him to exist or should by the exercise of due diligence on his part become known to him to exist." CPL 240.20 (1 b).

The statements found by the Court to have been freely made by the defendant to the arresting officer and to the police agent, Lee, were crucial to the people's case. The denial of discovery of these statements, to the defendant made it impossible for him to prepare adequately his defense.

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Conclusion

In conclusion thereof it can truly be said, relator has been deprived of due process in complete derogation of the 14th Amendment to the Constitution of the United States, wherein relator is unconstitutionally detained and deprived of his liberty in violation of the Constitution and Laws of the United States.

Wherefore, relator prays for the relief sought, in the interest of fundamental Justice and upon Constitutional grounds.

Respectfully Submitted,

/s/ (Illegible)
Relator-Petitioner Pro Se
135 State Street
Auburn, N.Y. 13022

Sworn to before me this
27th day of November, 1973

/s/ ELAINE A. GRAVES
ELAINE A. GRAVES
Signature of Notary Public

ELAINE A. GRAVES
Notary Public, State of New York
(Illegible)
My Commission expires March 30, 1975

**Order of Supreme Court, Bronx County,
Denying Motion to Vacate Judgment**
SUPREME COURT OF THE STATE OF NEW YORK

PART 60, COUNTY OF BRONX

Indictment Number 2834/70

Motion For: CPL 440

THE PEOPLE OF THE STATE OF NEW YORK,
against

JOSEPH ALLAN WILSON.

Present: Hon. JOSEPH COHEN, J.S.C.

	<i>Papers numbered</i>
Notice of Motion and Affidavit Annexed	1-3
Answering Affidavits	6-7
Stenographer's Minutes	4-5
People's Memo of Law	8
People's Exhibits	1-2

Upon the foregoing papers this motion is denied. The issue was previously raised on appeal and cert. was denied by the U.S. Supreme Court in 1979. Furthermore, in *U.S. v. Henry*, 447 U.S. 264 (1980) relied on by defendant the cellmate was a paid government agent. In any event *Henry* is not retroactive as to this defendant (*People v. Pepper*, 53 N.Y.2d 213).

Opinion filed,
Dated: 11/20/1981

/s/

J.S.C.
JOSEPH COHEN

**Wilson's Second Petition For a Federal
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FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER 28 U.S.C. §2254

Name JOSEPH ALLAN WILSON

Prison Number #72-A-0426 A-10/26

Place of Confinement Auburn Correctional Facility
Auburn, New York

United States District Court, Southern District
of New York

Case No. (Illegible)

(To be supplied by Clerk of U.S. District Court)

JOSEPH ALLAN WILSON, PETITIONER

(Full name) (Include name under which
you were convicted)

v.

HON. ROBERT HENDERSON, RESPONDENT

(Name of Warden, Superintendent, Jailor, or authorized
person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

HON. ROBERT ABRAMS, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

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PETITION FOR WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY

INSTRUCTIONS—READ CAREFULLY

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.
- (2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) Upon receipt of a fee of \$5.00 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds \$....., you must pay the filing fee as required by the rule of the district court.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge

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judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is
- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Supreme Court of the State of New York, Bronx County
2. Date of judgment of conviction April 20, 1972
3. Length of sentence 20 years Sentencing judge Hon. Edward T. McCaffrey
4. Nature of offense or offenses for which you were convicted:
murder
possession of a weapon as a felony
5. What was your plea? (Check one)
 - (a) Not guilty (x)
 - (b) Guilty ()
 - (c) Nolo contendere ()

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If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)
 - (a) Jury (x)
 - (b) Judge only ()
7. Did you testify at the trial? (Yes) No (x)
8. Did you appeal from the judgment of conviction? Yes (x) No ()
9. If you did appeal, answer the following:
 - (a) Name of court Appellate Division of the Supreme Court, First Department
 - (b) Result Leave to appeal denied
 - (c) Date of result April 23, 1973

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: Petitioner filed a petition for certiorari to the United States Supreme Court on April 30, 1979. The petition was denied without opinion. 442 U.S. 945 (1979).
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (x) No ()
11. If your answer to 10 was "yes", give the following information:
 - (a) (1) Name of court United States District Court, Southern District of New York
 - (2) Nature of proceeding Habeas corpus petition
 - (3) Grounds raised (a) a denial of petitioner's motion to dismiss the indictment against him for failure to prosecute violated the U.S. Constitution and laws of N.Y., (b) admission at

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trial of petitioner's statements to the arresting officer violated the U.S. Constitution; (c) admission at trial of petitioner's statements to his cellmate, a conceded police agent, violated the U.S. Constitution; (d) the state court erred in failing to rule upon or grant petitioner's motion for discovery pursuant to CPL 240.20

- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (x)
- (5) Result Petition denied
- (6) Date of result January 7, 1977
- (b) As to any second petition, application or motion give the same information:
- (1) Name of court United States Court of Appeals for the Second Circuit
- (2) Nature of proceeding Appeal from denial of petition
- (3) Grounds raised (a), (b) and (c) as stated in answer (a)(3) above
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (x)
- (5) Result Denial of petition affirmed
- (6) Date of result September 20, 1978
- (c) As to any third petition, application or motion, give the same information:
- (1) Name of court United States Court of Appeals for the Second Circuit
- (2) Nature of proceeding Motion for rehearing or rehearing en banc
- (3) Grounds raised (a) and (b) as stated in answer (a)(3) above

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- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (x)
- (5) Result Rehearing and rehearing en banc denied
- (6) Date of result January 23, 1979
- (d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:
- (1) First petition, etc. Yes (x) No ()
- (2) Second petition, etc. Yes (x) No ()
- (3) Third petition, Yes (x) No ()
- (e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief.

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You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

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- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

- A. Ground one: *The admission of trial of petitioner's statements to his cellmate, a conceded police agent, violated petitioner's Sixth and Fourteenth Amendment right.*

Supporting FACTS (tell your story *briefly* without citing cases or law): Following his arrest and arraignment, petitioner was placed in a detention cell, which overlooked the scene of petitioner's alleged crime, with one Benny Lee. Lee had agreed with the detective who had arrested petitioner to act as an informant. In the absence of his retained counsel, petitioner was induced by Lee to make certain statements to Lee concerning his participation in the alleged crime. Lee reported these statements to the detective and later testified at petitioner's trial as to said statements.

(See accompanying memorandum for a more complete statement of supporting facts).

- B. Ground two:
Supporting FACTS (tell your story *briefly* without citing cases or law):
- C. Ground three:
Supporting FACTS (tell your story *briefly* without citing cases or law):
- D. Ground four:
Supporting FACTS (tell your story *briefly* without citing cases or law):

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13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:
14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes () No (x)
15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
- (a) At preliminary hearing Alfred H. Adler, Esq.,
445 Park Avenue, New York, New York (by assignment)
 - (b) At arraignment and plea (same)
 - (c) At trial (same)
 - (d) At sentencing (same)
 - (e) On appeal (same)
 - (f) If any post-conviction proceeding Jeffrey Zuckerman, Esq. (currently with Antitrust Div., U.S. Dept. of Justice, Wash., D.C.); Richard Lyon, Esq.*
 - (g) On appeal from any adverse ruling in a post-conviction proceeding: (same)
16. Were you sentenced on more than one count of an indictment, or more than one indictment, in the same court and at the same time? Yes (x) No ()
17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes () No (x)

* (currently with Anaconda-Ericsson, Stamford, Ct.).

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- (a) If so, give name and location of court which imposed sentence to be served in the future:
- (b) And give date and length of sentence to be served in future:
- (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ()
No ()

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 2, 1982
(Date)

JOSEPH ALLAN WILSON
by IDA C. WURCZINGER
(Signature)

IDA C. WURCZINGER
Signature of Attorney
(if any)

**Memorandum in Support of Wilson's Second Petition
For a Federal Writ of Habeas Corpus**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 5186 (RLC)

JOSEPH ALLAN WILSON,

Petitioner,

against

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent.

MEMORANDUM IN SUPPORT OF WILSON'S

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Joseph Allan Wilson submits this Memorandum in support of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, or in the alternative, for an order vacating the prior judgment of this Court pursuant to Federal Rule of Civil Procedure 60(b)(6), and granting his original petition for a writ of habeas corpus.

STATEMENT OF THE CASE

Wilson is presently incarcerated in the Auburn Correctional Facility in Auburn, New York, serving a sentence of twenty years to life on a murder conviction and a concurrent term of up to seven years for possession of a weapon as

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a felony entered by the Supreme Court of the State of New York, Bronx County, on May 18, 1972. The following facts are undisputed.

Wilson's Arrest and Arraignment

On July 8, 1970, Wilson voluntarily surrendered himself to Detective Cullen and Dunn of the New York Police Department after having learned that he was sought by the police in connection with the July 4, 1970, robbery of the Star Taxicab Garage ("Star") and the shooting of the Star dispatcher on duty. (Transcript of "Huntley hearing" at 61, annexed as Exhibit A to the Affirmation of Ida C. Wurczinger,* subscribed to July 2, 1982.) Wilson was told that he was under arrest. Then, after Detective Dunn left the room, Wilson told Detective Cullen that he had been at Star looking for his brother, had heard shots, and had run because he "was afraid [he] would be blamed." (Ex. A at 27-29). Wilson was arraigned and counsel was assigned to represent him on July 9, 1970.

The State's Use of an Undisclosed Police Informant

On July 13, 1970, four days after Wilson had been sent to the Bronx House of Detention, he was transferred to a cell that overlooked Star—the scene of his alleged crimes. Wilson's cellmate was one Benny Lee, a prisoner who had been transferred to that cell after he had agreed, pursuant to Detective Cullen's request, "to keep his ears open . . . if he was put in the same cell with [Wilson] . . . as to the other two perpetrators [of the Star robbery]." (Ex. A at 55-56.)

Initially, Wilson's statements to Lee concerning the robbery were essentially identical to what he told Detective

* All exhibits cited in this Memorandum refer to those annexed to the Wurczinger Affirmation, submitted in support of this motion.

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Cullen. While Wilson was still visibly "upset about the fact that he [had been] moved from one cell upstairs to another that faced [the Star] garage. . . .", Lee told petitioner "that the story wasn't—it didn't sound too good." (Ex. A at 57-58.) A few days later, Wilson, unaware that Lee was a government informant, told Lee that he had planned and executed the robbery with two other men. (Ex. A at 60.) Lee, who had been making notes of his conversations with Wilson (Ex. A at 66), reported this statement to Detective Cullen. (Ex. A at 72.)

Pretrial Suppression Motion

Wilson moved prior to trial to suppress his statements to Lee. After a "*Huntley* hearing," the trial court denied the motions (Ex. A at 141-144) based upon its finding that the statements "were spontaneous and not as a result of any interrogation by Lee."

Wilson's Trial and Conviction

At Wilson's trial, Lee testified as to Wilson's statements to him concerning the Star robbery. (Petition for Writ of Habeas Corpus at 3, annexed as Exhibit B to Wurczinger Aff.) At the conclusion of the trial, on April 20, 1972, the jury found Wilson guilty of murder and possession of a weapon as a felony. (Ex. B at 1.) On May 18, 1972, he was sentenced to a prison term of twenty years to life on the murder conviction and to a concurrent term not to exceed seven years on the weapons conviction. (*Id.*) On April 23, 1973, the Appellate Division affirmed Wilson's conviction and leave to appeal to the New York Court of Appeals was denied. (Ex. B at 2.)

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Wilson's Initial Application for Habeas Corpus Relief

Wilson filed his initial petition for the writ of habeas corpus, *pro se*, in the United States District Court for the Southern District of New York on December 7, 1973. (See Ex. B.) One of Wilson's major arguments was that the trial Court had admitted his statements to Lee improperly because they had been obtained through methods that violated his constitutional rights. (Ex. B at 10-11.) The State's response and Wilson's reply were filed on March 25, 1974. On January 7, 1977, the District Court issued its decision denying the petition on the ground, *inter alia*, that "there was no interrogation" by Lee and that Wilson's statements were thus "spontaneous." (*Wilson v. Henderson*, No. 73-5186, slip op. at 8 (S.D.N.Y. Jan. 7, 1977), annexed as Exhibit C to Wurczinger Aff.)

The Court of Appeals affirmed by a divided vote, with Judge Oakes dissenting on the Sixth Amendment claim, *inter alia*. *Wilson v. Henderson*, 584 F.2d 1185 (2d Cir. 1978). The Court of Appeals subsequently denied rehearing and rehearing *en banc*, although three Circuit Judges (out of nine) voted to grant rehearing *en banc* to reconsider whether reversal of the holding as to Wilson's statements to Lee was required by *Massiah v. United States*, 377 U.S. 201 (1964). Judge Oakes noted that the issue had recently been decided "directly contrary to the panel majority in this case" in *Henry v. United States*, 590 F.2d 544 (4th Cir. 1978). *Wilson v. Henderson*, 590 F.2d 408, 409 (2d Cir. 1979). Wilson's petition for *certiorari* was denied without opinion. 442 U.S. 945 (1979).

The Supreme Court's Decision in Henry

Shortly after the Supreme Court's denial of Wilson's *certiorari* petition, the Court granted *certiorari* in the case of *Henry v. United States*, 590 F.2d 544 (4th Cir. 1978).

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The Court affirmed the Fourth Circuit decision holding that incriminating statements elicited from an indicted, in-custody defendant by his cellmate who was an undisclosed government informant could not be used at trial because the statements were obtained in violation of the defendant's constitutional right to counsel. *United States v. Henry*, 447 U.S. 264 (1980).

The Supreme Court expressly rejected the contention that a finding of "interrogation" by the government informant was a necessary element of a violation of the accused's Sixth Amendment right to counsel under *Massiah*. *Henry*, 447 U.S. at 271. It also held that "the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the government." *Henry*, 447 U.S. at 273.

Wilson's Exhaustion of State Court Remedies

On September 11, 1981, Wilson filed a motion in the Supreme Court of the State of New York, Bronx County, for an order pursuant to section 440.10 of the New York Criminal Procedure Law vacating the judgment of conviction entered against him. By an order, dated November 20, 1981, that court denied Wilson's motion, stating in full (citation omitted):

The issue was previously raised on appeal and cert. was denied by the U.S. Supreme Court in 1979. Furthermore, in *U.S. v. Henry*, 447 U.S. 264 (1980) relied on by defendant the cellmate was a paid government agent. In any event *Henry* is not retroactive as to this defendant.

(Order, dated November 20, 1981, annexed as Exhibit D to Wurczinger Aff.) Wilson's motion in the Appellate Divi-

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sion of the Supreme Court, First Department, for leave to appeal the November 1981 order was denied on January 19, 1982. (Certificate Denying Leave, dated January 19, 1980 (sic), annexed as Exhibit E to Wurczinger Aff.)

Argument

I.

Henry should be applied retroactively to vindicate Wilson's right to counsel.

The only issue before the Court is whether Wilson should have the benefit of the Supreme Court's decision in *Henry*. That decision established a right to counsel under a new set of circumstances that are present here. Furthermore all relevant considerations militate for the retroactive application of the new rule to *Wilson*.

First, *Henry* changed the law. At least two members of the Court considered the *Henry* rule to constitute "a new *Massiah* test" and a deviation from the principles followed in a recent Supreme Court decision dealing with the Sixth Amendment right to counsel, *Brewer v. Williams*, 430 U.S. 387 (1977). See *Henry*, 447 U.S. at 279-89 (Blackmun, J., and White, J., dissenting); see also *Cahill v. Rushen*, 501 F. Supp. 1219, 1225 (E.D. Cal. 1980) ("The Court dispelled much of the confusion engendered by *Brewer* this last term in *United States v. Henry*. . ."). Given that "[t]he doctrinal underpinnings of *Massiah* [had] been largely left unexplained" prior to *Henry*, 447 U.S. at 290 (Rehnquist, J., dissenting) and that two Circuit Courts, on the basis of substantially similar facts, had come to conflicting conclusions concerning the applicability of *Massiah*, it is clear that *Henry* made new law.

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Second, *Henry* plainly controls this case. Each of the three critical factors in that case is also present here: "First, [the person to whom the incriminating statements had been made] was acting under instructions as a paid informant for the government; second [he] was ostensibly no more than fellow inmate of [the accused]; third, [the accused] was in custody and under indictment at the time he was engaged in conversation by [the government agent]." 447 U.S. at 270.* All who have compared Wilson's case with *Henry* have noted that the two cases are indistinguishable. *Henry*, 447 U.S. at 281 (Blackmun, J., dissenting); *Wilson v. Henderson*, 590 F.2d 408, 409 (2d Cir. 1978) (Oakes, J., dissenting); *Henry v. United States*, 590 F.2d 544, 553 (4th Cir. 1978) (Russell, J., dissenting); *United States v. Sampol*, 636 F.2d 621, 637-638 (D.C. Cir. 1980). If anything, the "psychological inducements," "pressures," and "subtle influences" of confinement (*Henry*, 447 U.S. at 274) bore more forcefully upon Wilson who was placed in a cell that overlooked the very scene of the crimes.

Third, each of the three factors governing retroactivity favors retroactive application of *Henry* here. They are: 1) The purpose to be served by the new constitutional rule, 2) the extent to which law enforcement authorities had relied upon the prior law, and 3) the effect of retroactive application on the administration of justice. *Desist v. United States*, 394 U.S. 244, 249 (1969); *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

"Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist*, 394 U.S. at

* The fact that *Henry* had been indicted while Wilson had only been arraigned does not distinguish this case from *Henry*. Under federal law, a criminal defendant's right to counsel attaches on arraignment or even before. *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977).

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249. *Henry* changed the law with regard to the protections of the Sixth Amendment right to counsel—an area of constitutional law where the justification for retroactive application is strongest because the purpose underlying these protections is to ensure "the fairness of the trial—the very integrity of the fact-finding process." *Linkletter v. Walker*, 381 U.S. 618, 639 (1965). See also *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); and *Hamilton v. Alabama*, 368 U.S. 52 (1961). "The right to counsel at the trial, . . . on appeal . . . and at other 'critical' stages of the criminal proceedings . . . have all been made retroactive, since the 'denial of the right must almost invariably deny a fair trial.'" *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968) (per curiam) (citations omitted).* Given that this important purpose underlies the change in law enunciated in *Henry*, retroactivity is appropriate.

Considerations surrounding law enforcement officials' reliance or prior law compel the same conclusion. The *Henry* decision did not mandate any change in the ordinary pretrial procedures followed by law enforcement officials. Compare *United States v. Wade*, 388 U.S. 218 (1967). Rather, *Henry* prohibits an extraordinary abuse of the custodial advantage. In *Henry*, the Court established the Sixth Amendment right to counsel in a narrowly-defined set of circumstances, therefore retroactive application of *Henry* will not invalidate widespread police procedures previously believed necessary to the expeditious arrest and

* By contrast, the new rules for the conduct of custodial interrogations established in *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966) have not been applied retroactively because "the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination" and they encompass situations where the right to a fair trial is not invariably implicated. *Johnson v. New Jersey*, 384 U.S. 719, 729-730 (1966).

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conviction of suspects. It will serve simply to rectify a now apparent violation of civil rights perpetrated in the overzealous pursuit of a confession.

The effect of the retroactive application of *Henry* upon the administration of justice will similarly be minimal. The holding of *Henry* is very narrow, focusing on a concatenation of three particular facts: 1) A government informant, 2) acting in the guise of a fellow inmate, 3) while both are in custody, elicits damaging evidence that leads to the accused's conviction. The exoneration of those now laboring under convictions unfairly obtained on the basis of evidence gathered in this unique way can hardly cause the widespread distress of the criminal justice system.

The Supreme Court's *Henry* decision comes late, but not too late to vindicate Wilson's right to counsel. The new rule crafted by the Supreme Court in *Henry* for facts virtually identical to those of this case calls for relief for Wilson.

II.

The Court should grant Wilson's new habeas corpus petition or vacate its prior judgment and grant his original petition.

In light of *Henry* two avenues exist by which the Court may provide relief for Wilson. Under 28 U.S.C. § 2254(b), it may grant Wilson's new habeas corpus petition. Alternatively, under Federal Rule of Civil Procedure 60(b)(6), the Court may vacate its prior judgment, which denied Wilson's original petition, to reconsider that petition and grant Wilson habeas corpus relief.

The Court's *Henry* decision presents a ground under 28 U.S.C. § 2244(b) that requires consideration of Wilson's new petition for habeas corpus relief. See *St. Pierre v.*

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Helgemoe, 545 F.2d 1306 (1st Cir. 1976); *Vanhook v. Craven*, 419 F.2d 1295 (9th Cir. 1969); and *Alford v. North Carolina*, 405 F.2d 340 (4th Cir. 1968), reversed on other grounds, 400 U.S. 25 (1970). Wilson has efficiently and diligently exercised his right to petition for habeas corpus relief on a theory that the Supreme Court has now expressly adopted. Had he "slept on his rights" until the present time and then exercised them, Wilson would certainly be entitled to habeas corpus relief. Refusing to grant his new application would be manifestly unjust on the facts of this case because it "would produce an anomaly whenever the rights of accused persons were expanded by the courts: state prisoners who had slept on their rights would go free, while those who had been diligent would be barred from federal relief." *St. Pierre*, 545 F.2d at 1308.

Alternatively, the Court should reconsider and grant relief pursuant to Wilson's original habeas corpus petition. Federal Rule of Civil Procedure 60(b)(6) empowers this court to vacate its prior judgment which denied that petition, "whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-615 (1949). This court has held that where a change in the law reverses the rationale underlying its previous dismissal of a legal claim, the interests of justice require that its previous judgment be vacated and that the claimant be afforded an opportunity to have his day in court. See *Tsakonites v. Transpacific Carriers Corp.*, 322 F. Supp. 722 (S.D.N.Y. 1970).

The holding of *Henry* represents a change in the law that undermines the basis for this Court's earlier rejection of Wilson's petition. All courts that considered Wilson's Sixth Amendment claim reasoned that the government informant to whom the incriminating statements were made did not interrogate Wilson and hence that Wilson's

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statements to Lee were voluntary. *See Wilson v. Henderson*, No. 73-5186, slip op. at 8 (S.D.N.Y. Jan. 7, 1977); *Wilson v. Henderson*, 584 F.2d 1185, 1190 (2d Cir. 1978). *Henry* makes clear, however, that that is not the proper inquiry.

Wilson is therefore entitled to an opportunity to have a court consider the contention which lies at the core of his Sixth Amendment claim, that, despite the absence of interrogation, his statements to Lee were deliberately elicited in the absence of his retained counsel and hence were introduced at trial in violation of his Sixth Amendment rights. The interests of justice warrant, if not compel, that this Court grant Wilson's new petition or vacate its prior judgment and grant his original petition in order to afford Wilson the opportunity to have his Sixth Amendment contention considered on its merits.

CONCLUSION

For the foregoing reasons, in light of *Henry*, this Court should grant Wilson's new application for a writ of habeas corpus, or vacate its previous judgment and grant Wilson's original habeas corpus petition, and grant such other and further relief as it may deem just and proper.

New York, New York
July 2, 1982

Respectfully submitted,

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